ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
APR 20 1967
JOHN F. DAVIS, CLERK

No. 1304

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

IN THE MATTER OF MORRIS BRAUER,
An Attorney at Law.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

ABRAHAM GLASSER
Attorney for Petitioner
Morris Brauer
52 Eighth Avenue
New York, New York 10014

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	4
Constitutional Provisions and Statutes Involved	8
Statement of the Case and of How the Federal Questions Are Presented	8
Reasons for Granting the Writ	30
Conclusion	51
Appendix A—Opinion of Supreme Court of New Jersey	A-1
Appendix B—Report, etc. of Master	A-22
Appendix C—Order of Suspension	A-52
Appendix D—Order Denying Rehearing	A-53
Appendix E—Rules of the Supreme Court of New Jersey	A-54

Authorities Cited

Cases

In Re Cohn, 46 N.J. 202 (1966)	47
Konigsberg v. State Bar of California, 353 U.S. 252, later appeal 366 U.S. 36	34

PAGE

New Jersey State Bar Association v. Northern New Jersey Mortgage Associates, 55 N.J. Super. 230, 150 A. 2d 496 33

Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 34

Shuttlesworth v. Birmingham, 382 U.S. 87 ..... 6, 44

Spevack v. Klein, U.S. , 17 L. Ed. 2d 606 .. 34

Thompson v. Louisville, 362 U.S. 199 6

Willner v. Committee on Character & Fitness, 373 U.S. 96 34

Winberry v. Salisbury, 5 N.J. 240, 74 A. 2d 406 (1950), cert. den. 340 U.S. 877 33

Statutes

Fourteenth Amendment 4, 29, 34, 44

N.J. Const., Art. 6 §2, par. 3 33

28 U.S.C. §1257(3) 4

Rules

New Jersey Supreme Court Rules:

Rule 1:9-4 ..... 3, 8, 29

Rule 1:9-4(c) 29

Rule 1:16 ..... 8, 11, 39

Rule 1:16-1 30

Rule 1:16-1(a) 30

Rule 1:16-2(b) 31

Rule 1:16-3 31

Rule 1:16-4(b) 31

Rule 1:16-4(c) 31

Rule 1:16-4(d) 31

Rule 1:16-4(e) to (g) 31

Rule 1:16-4(h) 31

Rule 1:16-4(i) 32

Rule 1:16-7 31

PAGE

Rule 1:17 30
Rule 1:17-2 32
Rule 1:18 8
Rule 1:18-1 32
Rule 1:27A 4, 8

Miscellaneous

Annotation in 6 L. Ed. 2d 1328 34
Annotation in 15 L. Ed. 2d 889 44
Annotation in 98 L. Ed. 851-865 34

IN THE

Supreme Court of the United States

October Term, 1966

No.

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

IN THE MATTER OF MORRIS BRAUER,
An Attorney at Law.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Morris Brauer, prays that a writ of certiorari issue to review an order of the Supreme Court of New Jersey suspending him from the practice of law for three years, as described *infra*.

Opinions Below

The opinion of the Supreme Court of New Jersey (Appendix A hereto, *infra*) is reported in 48 N.J. 186, 225 A.2d 1. The "Report And Findings Of Fact" of the Master designated by the Supreme Court of New Jersey for investigation and hearing in this matter is not reported; it is printed as Appendix B hereto, *infra*.

Jurisdiction

The order of the Supreme Court of New Jersey suspending petitioner Morris Brauer from the practice of law for three years was entered November 21, 1966 (Appendix C hereto, *infra*). A "Petition For Rehearing Or Other Appropriate Reconsideration" filed February 13, 1967 was treated by the Supreme Court of New Jersey as timely and was denied by that Court on February 28, 1967 in an order stating, "No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied" (Appendix D hereto, *infra*). The time for filing a petition for certiorari in this case to review the order of suspension of November 21, 1966 has been extended by order of Mr. Justice Brennan to and including April 20, 1967.

The jurisdictional relevance of the above mentioned facts as to the petition for rehearing in the Court below is as follows: As of the stage of the case when the original decision and order suspending petitioner Brauer from practice were made (November 21, 1966) no Federal jurisdictional certiorari issue had been raised in the State disciplinary proceedings on behalf of petitioner Brauer, nor had any such issues relating to Mr. Brauer been expressly decided in the State proceedings. One purpose of the petition for rehearing in the Supreme Court of New Jersey was to supplement the record in a jurisdictionally appropriate manner so as to lodge in the record Federal jurisdictional certiorari issues which had previously been available to petitioner Brauer but had not been brought into the record. This purpose of the petition for rehearing was stated in explicit terms in that petition, i.e., we explicitly asked the Supreme Court of New Jersey either to grant the petition

or to *deny it on the merits,* but in no event to *dismiss* it; and we told the Supreme Court of New Jersey, in the petition for rehearing that the reason for this latter request was that if the Court entertained the petition for rehearing as timely and then considered the petition on the merits and *denied* it on the merits rather than merely *dismissing* it, we would be in a proper position to satisfy *prima facie* the jurisdictional requirements for certiorari in this Court. These requests, apprisals and explanations as to the certiorari jurisdiction problem which we presented to the Supreme Court of New Jersey in our petition for rehearing appear at pp. 2-3, 7, 23-24, 30, 31 of that petition, nine extra copies of which are filed herewith.

Should this Court deem that the question of the timeliness of our petition for rehearing in the Supreme Court of New Jersey persists notwithstanding that the petition was in fact entertained as timely, we respectfully call the Court's attention to the circumstances mentioned at pp. 3-7 of the petition for rehearing, to the effect that, on the advice of the Clerk of the Supreme Court of New Jersey, we filed our petition for rehearing in that Court at the time when we did, on the understanding that the rules of that Court relating to "Petition For Rehearing" (*N.J. Supreme Court Rules,* Rule 1:9-4—printed in Appendix E hereto, *infra*) were apparently not unambiguously applicable to a petition for rehearing or other reconsideration on behalf of an attorney seeking reconsideration of a disciplinary order; and that the Court below, as the highest Court of the jurisdiction (the State of New Jersey), retains and exercises an inherent continuing power to entertain review of such disciplinary matters affecting attorneys. See also *id.,*

Rule 1:27A, "Relaxation of Rules", quoted in Appendix E hereto, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourteenth Amendment due process and equal protection), for the reasons set forth *infra* under our "Statement of the Case and of How the Federal Questions Are Presented" and under our "Reasons For Granting the Writ".

Questions Presented

Petitioner, an attorney at law of the State of New Jersey, County of Hudson, who was admitted to the Bar in 1933 and has never until now been in disciplinary trouble, has been suspended for three years by the Supreme Court of New Jersey on a charge that he presented to a law partner of the Prosecutor of Essex County, New Jersey, a proposal to bribe the Prosecutor in the interests of gamblers. The only participants and witnesses to the alleged bribe-proposal conversation were petitioner and Harold Teltser, a law partner of the Essex County prosecutor. Petitioner swore and swears he is innocent. The regularly established New Jersey State procedure for disciplining attorneys, commonly termed the County Ethics Committee procedure, was not followed in this case. Instead, the Supreme Court of New Jersey ordered for this case a disciplinary procedure not provided for by Constitution, statute or Court Rule, and (to our knowledge) a procedure which is either unprecedented or based upon some rare (if at all existent) practical discretion of the Court below whereby the regularly established County Ethics Committee pro-

cedure became displaced or by-passed in this case by designation of a "Master of the Supreme Court". The questions are:

1. Since the nature of Mr. Teltser's charge against petitioner Brauer—that Brauer broached to Teltser a bribe proposal to be transmitted to Teltser's law partner, a County prosecutor—taken together with the fact that Teltser and Brauer were the only witnesses to the alleged conversation, necessarily made the factual issue one of direct conflict of credibility between Teltser and Brauer on a grave charge amounting to a charge of crime; and since the record contains nothing as to the respective character qualities or professional reputations of Teltser or Brauer; and since the regularly established County Ethics Committee procedure evidently has as one of its prime purposes the setting up of a professional "vicinage" type of disciplinary forum for lawyers in which their character and reputation may be evaluated by fellow attorneys of their own "vicinage" in the first instance; and since the record is devoid also of any signification by the Supreme Court of New Jersey as to any reason for displacing or by-passing the regularly established County Ethics Committee procedure, which by-passing in this case deprived petitioner Brauer of his own Hudson County Ethics Committee "vicinage"; and since no reason is even implicitly derivable from this record to explain or to justify such by-passing of the Hudson County Ethics Committee "vicinage"; and since the *ratio decidendi* of the decision below which adversely determined this disciplinary matter against petitioner Brauer is that Teltser's credibility (*viz.*, character) is to be preferred as opposed to Brauer's credibility (*viz.*, character); has not petitioner

Brauer been denied due process of law and the equal protection of the laws in that by unreasonable discrimination he has been deprived of a fair and impartial tribunal and a fair trial on the dispositive issue of credibility and professional character?

2. In view of the circumstance mentioned in Question 1, above, that the record is totally devoid of proof on the issues as to the respective qualities of character and credibility of the only two witnesses to the alleged bribe-proposal conversation, and in view of the indisputably dispositive (indeed sole) importance of this issue of credibility and character, has there not occurred here a violation, both by analogy and by proper applicability, of this Court's due process rule condemning State Court judgments which inflict a penal imposition upon an individual when the record is "totally devoid of evidentiary support" (e.g., *Thompson* v. *Louisville*, 362 U.S. 199; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87)?

3. Considering all of the circumstances alluded to in Questions 1 and 2 above, and considering also the established rule throughout the American jurisdictions that an attorney at law should not be disciplined except upon establishment of the disciplinary charges by "clear and convincing proof" (which connotes a standard of proof lying intermediately between the burden applied in a civil case and that applied in a criminal prosecution); and considering also that this standard or burden of proof in disciplinary proceedings against attorneys in turn apparently reflects an aspect of the principles of *substantive* due process in the sense that in any case of the disciplining of an attorney the record must demonstrate a reasonable relation between

the charges and the proofs thereof on one hand, and the legitimate object of public concern in enforcing standards of professional fitness on the other hand; does there not also arise in this case a violation of both procedural and substantive due process of law sheerly on the basis of unconstitutional inadequacy of proof?

4. In view, again, of the by-passing of the regularly established County Ethics Committee procedure, which is so formulated under formal New Jersey Court Rules as to result *inter alia* in an orderly procedural sequence in which a respondent attorney is assured of being accorded at some point a full evidentiary hearing before his County Ethics Committee upon proper notice and specific charges if the case develops to the stage where such a formal statement of charges and trial thereon are needed; and in view of the fact that in this case the by-passing in favor of reference to a Master of the Supreme Court of New Jersey never resulted in any such hearing on charges but was conducted throughout (at the Master stages) merely as an "investigation" in which petitioner Brauer was repeatedly assured by the Master that he was not facing "charges" or a "trial" on "charges" in the then proceedings before the Master; and in view of the fact that the Master nevertheless then went on to make an express written finding that petitioner Brauer "is guilty of unethical and unprofessional conduct"; and further in view of the fact that the next procedural step was the issuance by the Supreme Court of New Jersey of an order to petitioner Brauer to show cause before that Court why he should not be disciplined on the basis of the Master's findings, the ensuing proceedings before the Court below on the return to the order to show cause having consisted merely of presentation of briefs and

oral argument on the then record; and, finally, in view of the fact that the Court below ultimately denied on the merits a timely request by petitioner Brauer* to reopen the evidentiary hearing; has not petitioner been denied due process of law in that he has been adjudged guilty of professional misconduct and has been severely disciplined without adequate notice and hearing?

Constitutional Provisions and Statutes Involved

The case involves the due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution. It also involves N. J. Supreme Court Rules 1:9-4 (petition for rehearing), 1:16 to 1:18 (disciplinary proceedings), and 1:27A (relaxation of rules). These rules are printed in Appendix E hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

Petitioner, Morris Brauer, was admitted to the Bar of the State of New Jersey in 1933. Until the present disciplinary proceedings, he had never before been in professional disciplinary trouble (or in any trouble with the law). He was born and raised and has lived all his life in Jersey City, Hudson County, New Jersey, where his law office also has always been located. In the close-knit conditions of community and professional life in a small State like New Jersey, where, locality-by-locality, people tend to know their neighbors and where especially the members of each local

---

* This request was made by the previously mentioned petition for rehearing or other reconsideration (details *infra*).

Bar tend to know each other rather well and familiarly, petitioner Brauer's life-long location in Hudson County is not merely a fact of incidental personal or of general sociological interest, but is a fact which has direct importance for the Federal constitutional issues raised by this petition for certiorari.

One further preliminary observation seems appropriate before we go into the "Statement of the Case" as such. There exists in New Jersey a regularly established procedural system for official consideration of any charges from any source looking to the possible disciplining of attorneys. This procedure, established by formal Rules of the Supreme Court of New Jersey having the force of law*, is known as the County Ethics Committee procedure. At appropriate places *infra*** we note the pertinent operative details of the County Ethics Committee procedure, and of the ways in which the previously mentioned by-passing of that procedure in this case is believed to have worked unconstitutional injustices meriting the grant of certiorari herein.

The charge on which petitioner Brauer has been suspended for three years by the Supreme Court of New Jersey is that he made a proposal to another attorney, Harold Teltser, to bribe Mr. Teltser's law partner, Brendan T. Byrne, the Prosecutor of Essex County, New Jersey, to refrain from interfering with a certain alleged gambling activity. The disciplinary proceedings in this case originally involved also certain other charges against petitioner Brauer and another New Jersey attorney, Harold Krieger, but as to those other charges it was concluded in the pro-

---

* See the footnote at p. 33, *infra*. The Court Rules above referred to are quoted in Appendix E and are described and discussed at pp. 30 *et seq.*, *infra*.

** See last preceding footnote.

ceedings below that "with respect to Brauer, the record cannot support a finding of guilt".*

Under date of January 12, 1966 the Supreme Court of New Jersey issued an order designating New Jersey Superior Court Judge James R. Giuliano as a Master "for the purpose of conducting an investigation and hearing to determine whether Morris Brauer is guilty of unethical and unprofessional conduct in seeking to induce another member of the Bar to transmit a corrupt proposal to Brendan T. Byrne, the prosecutor for Essex County".** The order further provided "that for purposes of the investigation

---

* These other charges involved alleged theft of and tampering with files relating to a private civil litigation—not connected with anything involved in this petition for certiorari—in which Mr. Krieger was attorney for one of the parties and Mr. Brauer was a family relative of the parties. The certified record herein, and some of the papers printed in the Appendix hereto, *infra*, include considerable materials relating to the aforementioned other charges. In fact, the bulk of the certified record, including all of the volumes of the testimony taken before the Master except the testimony of March 25, 1966, relate to those other charges, and to still another charge involving Mr. Krieger alone which also arose out of the separate civil litigation referred to above. The reasons why so much extraneous matter has had to be filed by us as part of the certified record herein are that the charges on which petitioner Brauer was cleared or in which he was not involved were processed in the proceedings below jointly with the within separate charge against Brauer concerning the alleged bribery proposal; and that in those joint proceedings procedures were employed which commonly affected all of the charges against both Krieger and Brauer, some of those common procedures being the subject of points raised in this petition for certiorari.

** The order of January 12, 1966 above referred to, and all other orders and other official papers hereinafter referred to, are included in the certified record filed herein. In certifying the record the Clerk of the Supreme Court of New Jersey listed and described the items certified but he did not paginate the certified record. It is therefore necessary for us to refer to each certified item by a short descriptive reference rather than by a record page reference.

and hearing directed by this Order Judge Giuliano shall act as an Ethics Committee and shall have all the powers conferred upon such a Committee by Rule 1:16".* The Master was also ordered to file with the Supreme Court of New Jersey "a full report * * * setting forth his findings of fact, together with the transcript * * * of the testimony taken before him and the original of all exhibits received in evidence before him".

Under the same date (January 12, 1966) the Supreme Court of New Jersey issued a similar order for the same Master to conduct an investigation and hearing as to the other aforementioned charges—on which, as noted, petitioner Brauer has been found not guilty. As indicated in a footnote, *supra* (p. 10), the hearings before the Master, Judge Giuliano, were mainly occupied with those latter charges which are no longer in this case.

The testimony before the Master on the charge here involved—the alleged bribery proposal—was taken on March 25, 1966; the testimony of the latter date appears in a separate typewritten volume of that date (March 25, 1966) which is a part of the certified record filed herein, and nine extra copies (Xerox) thereof are also filed herewith. We summarize the aforesaid testimony of March 25, 1966 (page references are to the page numbering of the typewritten stenographic minutes, which we shall cite as "S.M. 3/25/66, p. "):

At the outset of the hearing before the Master on March 25, 1966 the following important aspect of the procedural setting was placed upon the record (S.M. 3/25/66 pp. 3-4):

---

* Rule 1:16 is quoted in Appendix E hereto, *infra*, and is described and discussed at pp. 30 et seq., *infra*.

"Mr. Bergin:* May it please the Court, this is a hearing against Morris Brauer, an Attorney-at-law of New Jersey, in which it is alleged that there has been a violation of the Canons of Ethics in that he made an improper suggestion to Harold Teltser, an Attorney-at-law of the State of New Jersey, concerning corruption of the Essex County Prosecutor.

Mr. Van Riper:** I don't want to get into a dispute over the Prosecutor's statement, but is there an allegation that some act has been committed by Mr. Brauer? I assumed this was an investigation the same as the one we just concluded on the other matter.

Mr. Bergin: I'm stating that this is what we are investigating. If I worded it inartistically, I apologize.

The Court: It ought to be understood, there are no charges. We are inquiring into an incident, if an incident did occur. I think that's probably better stated."

Thus, petitioner Brauer entered upon the supposed "hearing" before the Master (specifically with reference to the charge here involved) in a procedural setting in which it was made explicit by the Master himself that this was not at that stage in any sense a hearing or trial upon charges.†

The first witness before the Master on March 25, 1966 was Harold Robert Teltser (S.M. 3/25/66 p. 4). Mr. Teltser

---

*Counsel assigned to assist the Master.

** Counsel for Brauer.

† See our Question Presented 4, *supra*. See also our further description *infra* of the ways in which this same procedural indistinctness or anomalousness as to the "trial upon charges" status of the case had been insisted upon by the Master from the outset, i.e., at the anterior stages when the Master was taking testimony relating to those other charges as to which petitioner Brauer was eventually cleared.

stated that he was the law partner of Brendan T. Byrne, the prosecutor of Essex County (*id.*, p. 4). In October 1965 Teltser had a client named Edward Rabin, who was trying to get a business loan from one Julius Steinberg, a client of petitioner Brauer, to complete a business deal (*id.*, pp. 5-6). Around the middle of October 1965 Teltser and Brauer had several telephone conversations about the legal details looking to completion of the Rabin-Steinberg loan transaction; Teltser had not previously known Brauer (*id.*, pp. 5-6). On the evening of October 19, 1965 there was a meeting at Steinberg's home, attended by Steinberg, Rabin, Teltser and Brauer (*id.*, p. 8). There was a discussion of details as to payment of interest on the proposed loan, and "in the midst of the discussion" Brauer asked Teltser, "Can I see you alone for a minute", Teltser said "Surely", and the two went into an adjoining room, closing the door (*id.*, pp. 9-10). According to Teltser the following then occurred (*id.*, pp. 10-14):

> "A. Mr. Brauer started by saying, 'Do you know Brendan Byrne?' And he said, 'Do you talk to him?' I said, 'He's my partner. Of course I talk to him.' He said something about, 'What's he looking for?'—you know—'Doesn't he like money? Is he looking for another position?' And I listened. I don't remember—you know—the 'he said' and 'I said'. The text of it was he had a very high class craps game.
>
> Q. Who had? A. Mr. Brauer. No, no. He didn't have it. He knew people—as I recall it, he knew people who had a very high class craps game that they wanted to run in Essex County; that they were in a position where they had the municipality taken care of, the Attorney General and—
>
> Q. The Attorney General? A. The Attorney General. And the only thing that they needed was Bren-

dan Byrne. And they were willing to pay a lot of money. And that was the basis of it.

Q. What did you say when that proposal was made to you, as you recall? A. Well, the sequence of the things that I said I don't remember exactly. But basically I said—when he said 'Doesn't Brendan Byrne like money?', I said, 'Sure he likes money. But he's capable of earning a good amount of money in our law practice and in honest endeavors. I believe other efforts have been made.' You know, this is not like all at one time. I said, 'I believe other efforts have been made unsuccessfully with Brendan.' You know—'I don't think it's going to happen.' That was it basically. It took a lot longer time to say all these things, but that was basically it. We left it with the fact that he said—the last thing he said was, 'Well, would you talk to him?' And I said, 'Sure, I'll talk to him.'

Q. And then what did you do? A. I went out to finish the transaction. That was really my purpose in being there.

Q. And the transaction was finished. Right? A. The transaction was—at that time the transaction was completed in a matter of minutes.

Q. When did you next see your partner, Mr. Brendan Byrne? A. The following day.

Q. Did you tell him what happened? A. I did.

* * * * *

Q. What did he say? A. He said—well, he said, 'That's ridiculous.' He said, 'That's ridiculous.' He said, 'You know, I will have to tell the Attorney General.' And let me go back one step over here so we have the flavor of it, because I think in fairness to everybody here we ought to. I thought about this over night. And I thought to myself: Why did I

even say that I would talk to him, or I would mention it? Because when I said that, in my mind I thought to myself: O. K. I'll mention it to Brendan as kind of a lark. Not as a lark—but when he said, 'Will you mention it to him?', I said, 'Fine. I'll mention it to him.' Then I thought to myself: It was a burden for me to have to mention that to Brendan because I knew in mentioning it to Brendan that he would then have to report this to the Attorney General. And I walked in to Brendan and I said, 'Brendan, I think I handled this particular thing wrong, and I'm sorry, but I'm at a point where I have to tell you.' And I told him what happened.

Q. Did you discuss this with your client that evening? A. I mentioned—I did not discuss it fully with my client. When we left the house that evening I was concerned. Can I go back one step again to volunteer?

* * * * *

A. (continuing) When Mr. Brauer asked that we go into a room alone, I was then concerned with my client and what my client would think transpired in that room and how it may or may not affect him. I was concerned with how he would relate that to the transaction. So when we left the house, the things that we wanted were resolved favorably to my client anyway. There really wasn't any purpose of going into an explanation, but I said, 'Eddie, that had nothing to do with you at all. He had some kind of a thing that he wanted me to discuss with Brendan Byrne.' And that's the way it was left. And I think I said, 'I don't think you need to know anything more about it than that.' "

Teltser also testified that Brauer never tried to contact him thereafter (*id.*, p. 16).

The foregoing is from Teltser's testimony on direct examination. On cross examination Teltser acknowledged that the proposed loan transaction was not just an ordinary note transaction, it was to involve a pledge of corporate stock and other difficult details, and he (Teltser) and Brauer during their several telephone conversations prior to the meeting at Steinberg's house on October 19, 1965 had found themselves in disagreement as to how the matter should be handled; one of the points in severest dispute had been Brauer's request to Teltser that the latter personally guarantee the loan because the Steinberg money which Rabin wanted to borrow was to be used in a business enterprise in which Teltser was himself a partner (*id.*, pp. 18-21). Teltser also acknowledged on cross examination that "Frankly, I thought that many of the things that Mr. Brauer was saying to me were directed towards finding out whether I had confidence in the value of that stock", and that Teltser "absolutely" "considered that to be a perfectly legitimate inquiry" (*id.*, p. 21). From this last it then developed in the cross examination of Teltser that, contrary to the insinuations in his direct testimony (quoted *supra*), he was not really able to attach any sinister significance to Brauer's telephone request that the two attorneys have a private meeting (*ibid*).* Teltser further said on cross examination that he, Rabin and another partner (Abe Simoff) in the business deal for which Rabin wanted the loan from Steinberg, needed to raise $75,000 of capital, that Teltser and Simoff each had their one-third ($25,000),

---

* It thus becomes altogether believable that if Brauer did request a private meeting with Teltser in the telephone conversations prior to October 19, 1965 it was or could well have been prompted by a legitimate desire by Brauer to probe, as any diligent lawyer would, the financial safety of the transaction proposed to his client Steinberg.

and that he and Simoff were accordingly interested in Rabin's getting his $25,000 contribution (*id.*, pp. 22-23); and Teltser further acknowledged that he was "eager" for Rabin to get the Steinberg loan and felt "frustrated" by Brauer's attitude in desiring further discussion with Teltser (*id.*, p. 23). Teltser also admitted that on one occasion when he and Brauer had arranged a private meeting at Teltser's house (prior to October 19, 1965) and Teltser had unexpectedly become obliged to postpone the hour of the meeting from 8 P.M. to about 10 P.M., Brauer had declined the invitation for the later meeting that night saying, "That will be too late. We will do it another time" (*id.*, pp. 25-28).*

The next item to be noted in Teltser's cross examination is of special importance. At *id.*, p. 30, Teltser admitted that there had been a discussion between Steinberg and Rabin, at the October 19, 1965 meeting, preceding Teltser's and Brauer's retirement to a private room, concerning "additional interest" over six per cent for the loan from Steinberg to Rabin, i.e., there was a discussion of usurious terms of interest; Teltser at first—in this portion of the cross examination—tried to disassociate himself from this usury, but as the cross examiner pressed him, Teltser said, "There is no question I knew it was there. I really didn't want to

---

* This scarcely indicates any illicitedly inspired ardor or impatience on Brauer's part for a private meeting with Teltser. (Perhaps we should mention at this point that our reason for devoting so much attention to details of the testimony before the Master is that we respectfully want this Court to see in some meaningful degree the factual structure of the credibility issue (as between Teltser and Brauer) on which we claim Brauer was denied a constitutionally adequate hearing and determination.)

be involved in the transaction, but basically I was a part of that transaction.'"*

Also important is this next item from Teltser's cross examination (*id.*, pp. 43-44), which is to be read in connection with Teltser's statement on direct examination (*id.*, p. 11—quoted *supra*) that when Brauer allegedly asked him whether he would talk to the prosecutor, Teltser had answered "Sure, I'll talk to him". Now, in the cross examination Teltser further testified about this as follows (*id.*, pp. 43-44):

> "Q. You would never knowingly permit yourself to be used as a vehicle to convey a corrupt proposition to the prosecutor, would you? A. I would not.
>
> Q. No. Of course not. Well, when you went out of that room that night after Brauer had made this suggestion to you and you said 'I will talk with him about it', don't you think that that left the impression that you were going to convey the message to Prosecutor Byrne? A. I made it very clear to Mr. Brauer that Brendan Byrne was not interested in money, was not interested in bribes, was not interested in promises or rewards for this type of thing. And when it was all done he said, 'Will you

---

* As will appear, this revelation that the principals at the October 19, meeting (Steinberg and Rabin) discussed usurious interest for a transaction in which Teltser himself had an "eager" (*supra—id.*, p. 23) and substantial financial interest as a business partner, a revelation which had to be extracted from Teltser on cross examination, was the actual and only reason why Brauer asked Teltser to leave the room with him at Steinberg's home on that evening (see p. 21, *infra*). Brauer, undisputedly, did not have any such personal financial interest as Teltser had, Brauer's role being solely as attorney for Steinberg. In other words, Teltser in his direct examination evidently did not disclose that Brauer's suggestion that he and Teltser leave the room was entirely explainable by Brauer's proper professional concern over being placed in the position of participating in an illicit usurious arrangement.

> talk to him?' In fact, he may even have said, 'Will you talk to him anyway?' And I said 'Yes', I would. Now at that point, if you want to know what my thought was—at that point I thought—I thought about this very keenly, very deeply since it started —at that point I really felt it was so ridiculous for him to ask that question that I don't believe that I intended to talk to Brendan. But over night I realized that if I had said that to Morris Brauer, that I would talk to him anyway, that I really had to tell Brendan. When I went in to see Brendan the next day, as I told you before, I went in with apologies. I said, 'Brendan, I really probably should have not handled it this way, but I am obligated to tell you.' I did not really believe that there was enough substance over this in terms of a proposition that Brendan would entertain it to discuss it for that purpose. I discussed it with Brendan because I felt Brendan should be aware of what his partner was involved in, or what his partner had done."

The above is important because its involutions raise at least a strong question of the truthfulness of Teltser's entire testimony on the subject in view of the intimations that Teltser may have made the charge against Brauer in order to cover up a possible indiscretion or error of judgment on Teltser's own part.*

---

* As will appear, Brauer testified that it was Teltser who brought up the subject of his law partner Prosecutor Byrne's integrity after Brauer had spoken of a complaint which had come to his attention that the Teltser-Byrne law firm may have done something unethical in regard to a client named Madeline Christianson (*id.*, pp. 68-69—details *infra*).

(Again, we note that we are going into these details of the testimony on the issue of credibility as between Brauer and Teltser because we take it that evaluation by this Court of the points of unconstitutional procedure which we raise herein may be more meaningfully done against a fairly complete background of the relevant facts.)

Similarly at *id.*, p. 50 Teltser stated:

> "A. Judge, when I left that room that evening, and he made the statement to me, 'would you discuss it with him anyway', I really don't believe at that time that I intended to discuss it with Brendan Byrne. And I felt that I absolutely had to—by the next morning I absolutely had to. And I called Brendan or made sure that I could see him the next day to let him know, because as long as I had a discussion with anyone of that nature, I felt obligated to discuss it with him. But I do not believe that I had any intention when I walked out of the room to discuss it with Brendan."

The above reveals that Teltser had not at first deemed that he had to report anything against Brauer. This is scarcely credible if Teltser was telling the truth about what Brauer is actually supposed to have said. It is only credible on some theory that Teltser's eventual decision to make an accusatory report against Brauer was the result of some Dostoeveskian motivation on Teltser's part to cover up a possible indiscretion of his own, as above suggested.

Edward Rabin also testified (*id.*, pp. 55-58). He had observed Teltser and Brauer go into another room at Steinberg's home on October 19, 1965, he could hear nothing of what went on in the other room, and later Teltser told him that the conversation in the other room did not concern him (Rabin). On cross examination Rabin confirmed that Teltser and Brauer had left Rabin and Steinberg at the point where the parties were discussing arrangements concerning loan interest which did not become incorporated in the written agreement (*id.*, p. 58).

Julius Steinberg also testified (*id.*, pp. 58-60). During the meeting at his home on October 19, 1965 he had seen Teltser and Brauer retire to a private room, at a juncture when the parties were talking about interest on the loan.

Essex County Prosecutor Brendan T. Byrne testified concerning Teltser's report to him of the alleged conversation with Brauer; Mr. Byrne's description (*id.*, pp. 61-63) of Teltser's report was in substance the same as Teltser's previously herein quoted direct testimony of what he told Mr. Byrne (*id.*, pp. 10-11).

Detective Clinton L. Pagano testified that he had interviewed Steinberg during the Attorney General's investigation of Teltser's charge against Brauer, that Steinberg had made a remark indicating he thought Teltser was the prosecutor's brother, and that when Pagano asked, "Why, Mr. Steinberg? Did Brauer mention the prosecutor to you?", Steinberg replied, "No, no. Listen, Brauer has his troubles and I have mine. Let's leave it at that" (*id.*, p. 65).

Petitioner Brauer's own testimony before the Master was as follows (*id.*, pp. 65-93): When Steinberg and Rabin began to discuss usurious interest—in the meeting at Steinberg's home on October 19, 1965—Brauer suggested that he and Teltser leave the room (*id.*, p. 67). We quote Brauer's description of his private conversation which then ensued with Teltser (*id.*, pp. 68-69):

> "Q. And what happened when you went in there conversation-wise? A. Well, we got into this room. I mentioned the name of Madeline Christianson and the suit which she had brought against her brother-in-law and Mr. Goldfarb, who was the manager of the firm. See? That evidently in the course of the suit, see, it was determined that her brother-in-law and Goldfarb had looted the firm by charging up to her company for material and finished products that was done and the other firm got the benefit of it. And

she was a little unhappy about the fact that this was—that they knew about it and nothing was done about it.

Q. You say 'they knew about it'. Who is 'they'? A. The Teltser firm, who represented her.

Q. Oh, I see. A. And she was a little bit unhappy about it.

Q. Is this what you said to Teltser, that she was unhappy? A. This is the story I'm relating to Teltser. She was unhappy about it. And later on they sent a Jack Cohen to her to whom, she told me, she had to pay a thousand dollars. And she felt as though there was something, as she called it—I believe she said—fishy or unethical. I told her I wasn't interested in it. And I let it drop at that. And what happened, I don't know. Immediately after I had finished that conversation, Mr. Teltser said to me, 'Nobody could point a finger of suspicion at Mr. Byrne, the Prosecutor.' See? And I said 'Yes', I had heard of his reputation. See? He said he was offered all kinds of judgeships or better jobs to relinquish the prosecutorship of Essex County. He was offered money—see—by the gamblers or by politicians. I don't know exactly what he said—politicians or gamblers to allow—see—a plush game to operate in Essex County, which he refused. See? After he finished that statement I said to him, not in any manner of an offer, but as an exclamation to his remark—see—I said, 'Well, it's quite a thing when a fellow is offered all that kind of money and jobs, and so on and so forth, to be able to resist such temptation.' That was the end of our conversation. We went out of the room. And that was the last I ever saw of Teltser or ever heard of him.

Q. How long would you say you were in the room altogether? A. I would say it was less than five minutes."

Thus, Brauer's account is that when he broached to Teltser the topic that a client of Teltser's and Prosecutor Byrne's

law firm was dissatisfied, Teltser sprang to the firm's defense by making the above quoted remarks concerning Mr. Byrne's integrity.*

Brauer swore that he had not made to Teltser any such bribery proposal as charged, and that he had not said anything about having clients or friends engaged in gambling or wishing to conduct a gambling operation (*id.*, p. 70). Nor had Brauer ever had any such clients; nor had anyone ever spoken to him about desiring to conduct a gambling operation as here charged (*id.*, pp. 70-72); nor does he engage in any practice of criminal law at all (*id.*, pp. 92-93).

On cross examination Brauer gave further details of the Madeline Christianson topic; he had known Mrs. Christianson since she was divorced from her first husband about twenty-five years ago; the conversation in which she told him of her complaint about Teltser's law firm took place at her home around the year 1962; in bringing up the subject of Teltser, Brauer was speaking "I believe jovially" and in a semi-family spirit because apparently he (Brauer) had at one time contemplated marriage with Mrs. Christianson and the latter is the mother-in-law of a brother of Teltser; and when he went on to mention Mrs. Christianson's complaint to Teltser he did so in a casual spirit knowing that the matter was closed and "just to have something to talk about" when he and Teltser had to go into a private room to absent themselves from the usury discussion (*id.*, pp. 82-87).

---

* We have deferred mentioning, until this point, that in cross examination Teltser admitted Brauer spoke to him that evening about the client Madeline Christianson, but Teltser said this occurred when he and Brauer were first introduced at Steinberg's home that evening, that it was only in the nature of a social conversation about a mutual acquaintance or friend, and that nothing was said about any complaint by Mrs. Christianson against the Teltser-Byrne law firm (*id.*, pp. 51-53, 55).

Detective Pagano was recalled to the stand as a witness for petitioner Brauer; in his investigation, which had covered Brauer's "background" and "practice", he had discovered nothing "which indicated that Mr. Brauer had any connection either as a lawyer, or individually, with any gambling outfits" (*id.*, p. 93).

On June 20, 1966 the Master filed his "Report And Findings Of Fact" in the Supreme Court of New Jersey (Appendix B hereto, *infra*—the portion of the Master's Report relating to the Teltser-Brauer matter appears at pp. A-47-A-51, *infra*). The Master concluded that the issue was solely one of credibility as between Teltser and Brauer, and that Teltser's testimony was credible and Brauer's incredible (Appendix B hereto, *infra*, pp. A-50-A-51). While the Master referred to standards of "demeanor while testifying", etc., and stated that he "was not impressed with the witness, Morris Brauer" and that "his testimony lacked candor and was wholly improbable and unbelievable", it is evident from the Master's Report that the decisive reason for the Master's preferring to believe Teltser rather than Brauer is that "Teltser is a highly regarded and well respected member of the Bar" (*id.*, pp. A-50-A-51).* As we have men-

---

* Here one encounters in the most direct way the distressing problem of due process and equal protection deriving from the by-passing of the regularly established Hudson County Ethics Committee "vicinage" procedure. It must be mentioned that the Master, Honorable New Jersey Superior Court Judge James R. Giuliano, is a former Essex County attorney and sits as a Justice in Essex County. In mentioning this we intend no reflection on Judge Giuliano's motives of fairness; rather, we are drawing attention to his indicatedly not being in a position to evaluate the professional character background and qualities of Brauer without proof (the record being devoid of proof as to this, as well as on the question of Teltser's character). And as indicated earlier herein, we are able to represent to this Court that Brauer has never before been in trouble disciplinarily or otherwise with the law.

tioned, there is no proof whatever in this record on the question of the respective character qualities of Teltser or Brauer. Yet the Master evidently based judgment, as just seen, on matters outside the record in regard to this. And it was seemingly from such judgment devoid of record support that the Master went on to make certain further important "credibility" evaluations concerning Brauer's testimony, such as that "It would be incredible that an attorney upon meeting a brother attorney for the first time would indirectly accuse his firm of 'fishy or unethical dealings' ", and that "Brauer's testimony of Harold Teltser's impassioned defense of Brendan T. Byrne's integrity borders on a *non sequitur*" (Appendix B. hereto, *infra*, p. A-51).* Similarly, the Master stated (*ibid*) that, "to believe the testimony of Morris Brauer would be in effect saying that Harold Teltser deliberately lied, or was mentally unbalanced, or of such vicious bent as to deliberately destroy a fellow attorney. In view of the testimony before this Court, none of these possibilities exist." As we point out under our "Reasons", *infra*, this last vital credibility finding is constitutionally impermissible, and in Brauer's petition for rehearing in the Court below leave was sought,

---

* A proper question which the herein by-passed Hudson County Ethics Committee would have been in a better position (than the Master) to resolve is whether Morris Brauer may not in fact very well be a person of rather bluff and heavy-handed verbal temperament in whom it would be not at all "incredible that * * * upon meeting a brother attorney for the first time [he] would indirectly accuse his firm of 'fishy or unethical dealings' ", especially in view of Brauer's testimony (*supra*) that he was speaking jovially, casually, and just to have something to talk about with Teltser while they were obliged to absent themselves briefly from the usury discussion. As to the Master's suggestion of a *non sequitur*, we fail to understand this; it rather seems to us entirely logical and natural that Teltser would do exactly what Brauer described, namely, to go into what the Master refers to as an "impassioned defense of Brendan T. Byrne's integrity".

inter alia, to put the evidentiary record in a posture which might indeed throw light on these latter questions as to which the record is presently silent but as to which the Master (and the Court below—*infra*) have nevertheless seen fit to pronounce a factual judgment resulting in practical destruction of petitioner Brauer's professional career.

Under date of July 22, 1966 the Supreme Court of New Jersey issued an order to show cause to Brauer why he should not be disciplined by reason of the Teltser matter.* (As we indicate *infra,* Brauer, on advice of his then counsel, unfortunately did not seek a trial on the charge before the Supreme Court of New Jersey, and instead the matter was presented to the Court by a brief and oral argument.)

On November 21, 1966 the Supreme Court of New Jersey rendered a written opinion finding Brauer guilty of the Teltser charge (Appendix A hereto, *infra*—the portion of the opinion relating to the Brauer-Teltser matter appears at pp. A-16-A-20, *infra*); and an order was entered suspending Brauer for three years (Appendix C hereto, *infra*). The opinion of the Court below in substance adopted the reasoning and the conclusion of the Master.

Before describing Brauer's petition for rehearing in the Court below—by which that Court entertained and denied on the merits the Federal constitutional contentions urged in this petition for certiorari—it remains to note briefly the record facts as to the constitutionally anomalous procedure below whereby we contend Brauer has come to the end of the State procedural road in this case without having been afforded a proper due process trial as such on specific charges as such after proper notice or apprisal: As noted

* This order to show cause is included in the certified record herein, whose pages are unnumbered, as earlier mentioned.

earlier, the hearing before the Master (March 25, 1966) concerning the Brauer-Teltser situation had been preceded by hearings as to the charges on which Brauer had been cleared, and in which another attorney (Harold Krieger) was also named. Prior to the commencement of the hearings before the Master, Mr. Larner, attorney for Harold Krieger, had indicated in a letter to the Clerk of the Supreme Court of New Jersey that although the Master had interpreted the initiating Orders (of January 12, 1966) as empowering him to make findings and recommendations, it was indicated that this was not to be considered a hearing based upon charges but rather an "investigation"; Mr. Larner advised the Clerk that because this was an "investigation" he had not been furnished with particulars or charges; and that, such being the procedural situation in the then forthcoming hearings before the Master, should affirmative findings adverse to Mr. Krieger result from those hearings, he (Mr. Larner) would then request that a hearing be held on such findings with specific charges and particulars being furnished. Mr. Larner's above mentioned letter to the Clerk (February 8, 1966) is in evidence at p. 386 of the hearing transcript of February 17, 1966, as Exhibit RK-1.* Mr. Larner brought this subject up at the commencement of the hearings before the Master (2/14/66, p. 5). Nevertheless, throughout the hearings before the Master, we were repeatedly confronted with the theme that this was an "investigation," not a hearing upon charges. See, *e.g.*, the hearing transcripts of February 14 to March 24, 1966, at pages 5, 21, 33, 112, 167, 171, 203, 205, 254, 302-304, 355, 369-377, 417, 478, 495-496, 538-539. At p. 369 Mr. Larner announced that he had received a letter from the Clerk, which he read into the record, to the effect that the

---

* Not included in the certified record herein.

Supreme Court of New Jersey had considered Mr. Larner's letter of February 8, and that "this will be the final hearing in the matter and that if you feel the charges are not sufficiently specific you should ask for a Bill of Particulars from your adversary". The ensuing colloquy (in the hearings before the Master) at pp. 369-377 reveals the disconcerting impact which the above quoted communication from the Clerk had not only upon counsel's understanding of the procedure thereby laid down, but also on the understanding of the Master and the prosecuting attorney, Mr. Bergin. The procedural anomaly was never resolved in a satisfactory way, and indeed at pp. 495-496, counsel for Krieger stated, "Now, in view of the fact, as Your Honor has pointed out several times, this is only an investigation, there are no specific charges, and we have gotten no more specifics than appear in the order of the Supreme Court, I can see no purpose in presenting any further testimony".

Specifically also, at the commencement of the hearing before the Master on the Brauer-Teltser matter, Brauer's attorney, Mr. Van Riper, urged this same procedural difficulty, and the Master reiterated that Mr. Brauer was not at that juncture being tried on any charge (S.M. 3/25/66, pp. 3-4).

Thereafter, as above recited, the Supreme Court of New Jersey by order to show cause did present specific charges against Brauer; but this was subsequent to the Master's finding that Brauer was guilty of the Teltser charge, which finding the Master had made, as seen, under a repeatedly announced procedure in which Brauer was assured that he was not facing a trial on charges before the Master. (Under our "Reasons", *infra,* we set forth the ways in which the procedure before the Master resulted in constitutionally redressible prejudice.)

As also mentioned above, Brauer unfortunately did not seek a *de novo* trial on the charges before the Supreme Court of New Jersey until his petition for rehearing in that Court. We come now to the details of the relief sought by the latter petition.

Brauer's "Petition For Rehearing Or Other Appropriate Reconsideration" in the Court below* expressly noted that no Federal constitutional issues or other issues within the certiorari jurisdiction of this Court had theretofore been preserved on Brauer's behalf in the State disciplinary proceedings, and expressly requested that the petition for rehearing should be either granted or denied on the merits, but in no event merely *dismissed*, so that issues of certiorari cognizance in this Court might become properly lodged in the record (Pet. Reh. 2-3, 7, 23-24, 30, 31). As recited under the heading "Jurisdiction", *supra*, the Court below did entertain and deny the petition for rehearing on the merits; the order denying the petition for rehearing reads (Appendix D hereto, *infra*):

> "No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied."**

The Federal constitutional points urged in the petition for rehearing were: (1) denial of Fourteenth Amendment equal protection and due process through the by-passing, without any reason or justification therefor being stated in the record, of the regularly established Hudson County Ethics

---

* As stated, nine extra copies of that petition are filed herewith.

** Rule 1:9-4(c) of the Court below reads:

> "A petition for rehearing is not subject to oral argument, and the petition will not be granted, unless a justice who concurred in the judgment or decision moves it, and a majority of the court so determines."

Committee procedure, whereby petitioner Brauer was denied a fair, non-discriminatory hearing on the dispositive issue of his credibility as against the unsupported word of the single accusing witness (Pet. Reh. 8-24); (2) denial of due process in that petitioner's professional character and repute were adjudicated without proof within the meaning of the "totally devoid of evidentiary support" rule (Pet. Reh. 24-27); (3) denial of due process (both substantive and procedural) and equal protection in that petitioner was deprived of his right to a fair and proper application of the governing standard of "clear and convincing" proof (Pet. Reh. 27-29); (4) denial of due process through denial of a fair opportunity to make defense against the charge (Pet. Reh. 29-31).

REASONS FOR GRANTING THE WRIT

I

In Appendix E hereto, *infra,* we quote the New Jersey Supreme Court Rules 1:16, 1:17 and 1:18, relating to disciplinary proceedings against attorneys, under which the regularly established procedure calls for a highly detailed processing of such disciplinary matters in the first instance through a system of county-by-county Ethics Committees.

Rule 1:16-1 sets up the county-by-county system, in which each County Ethics Committee consists of attorneys "resident or practicing in said county" (Rule 1:16-1(a)).

Rule 1:16-2(a) confers upon each County Ethics Committee "jurisdiction over * * * any complaint made against any attorney practicing within its county, involving his character, integrity, professional standing or conduct as a member

of the bar". The latter Rule even anticipates jurisdictional conflicts as between different County Ethics Committees and provides that the Supreme Court of New Jersey "shall resolve the conflict and refer the complaint to the proper committee"; i.e., the Rules do not envisage a total by-passing of the County Ethics Committee system.

Rules 1:16-3 to 1:16-7 establish a complete, self contained procedure for the conduct of County Ethics Committee matters; these latter Rules leave out nothing that might occur to one's mind as needed for an effective autonomous disciplinary tribunal of first instance with general original jurisdiction on a county-by-county basis.

The County Ethics Committee procedure commences with the receipt of a complaint (Rule 1:16-4(b)) or with the institution of a complaint by the Committee on its own motion (Rule 1:16-2(b)). Thereafter the attorney involved is served with the complaint (Rule 1:16-4(b)), within ten days thereafter the attorney must file a written answer with the County Committee (Rule 1:16-4(c)), the complaint and answer are then referred to one or more County Committee members for preliminary investigation (*ibid*), a written report of the investigation and findings are then made to the entire County Committee (*ibid*), the County Committee may then either dismiss the complaint or set it down for formal hearing (Rule 1:16-4(d) and (e)), the formal hearing is then conducted in all respects as a hearing or trial upon charges (except for safeguards as to confidentiality and relaxation of the strict rules of evidence) (Rule 1:16-4(e) to (g)), the Committee may then dismiss the complaint or prepare a "presentment" for filing with the Supreme Court of New Jersey (Rule 1:16-4(h)) but no such presentment which aims at disbarment or other discipline

may be filed without an order of that Court (Rule 1:18-1), the Court then considers the County Committee's presentment and determines whether to issue an order to show cause why the attorney should not be disbarred or otherwise disciplined (Rule 1:16-4(i)), and if an order to show cause is issued a hearing is held before the Court "which hearing will be on the record before the committee" and the only presentation before the Court is made on briefs (plus, it would seem, oral argument) (*ibid*). Evidently the only situation in which a trial *de novo* following the completion of County Ethics Committee proceedings is contemplated by the Rules is where the Court orders the Board of Bar Examiners to review a County Committee proceeding (Rule 1:17-2), but the Rules do not indicate that in such latter situations the Court itself will thereafter further review the matter otherwise than on the record rather than *de novo*.

Thus, the County Ethics Committee procedure plainly contemplates that, for all practical purposes, the effective traditional due process incidents of a full evidentiary trial upon stated charges will occur only before the County Ethics Committee, or before the Board of Bar Examiners in cases where, apparently, the Court for some reason may not be satisfied with the conclusion reached by the County Ethics Committee.

Contrast the above described County Ethics Committee procedure with what was done in the present case. Here, petitioner Brauer, instead of receiving a full evidentiary trial on stated charges before the Hudson County Ethics Committee composed of fellow attorneys who would be in a position to evaluate his character and his credibility in a meaningful and understanding way, was remitted to a

specially designated judicial Master from the home County of the complaining witness (attorney Harold Teltser), and in those proceedings before the Master Brauer was repeatedly told that he was not facing a trial as such on charges as such. Under our "Reason" IV, *infra,* we return to this last mentioned aspect of no trial as such on charges as such. Here, we are more immediately concerned with the totally unexplained and evidently unprecedented or rare by-passing of Brauer's own County disciplinary "vicinage", regularly established under the Rules as above demonstrated, and there being no provision of Constitution, statute or court rule in New Jersey which allows any such by-passing—nor do we know of any New Jersey Court decision stating that such by-passing is legally or constitutionally permissible.* Even if the general powers of the

---

* N.J. Const., Art. 6 §2, par. 3 provides that "the Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted". As to the rule-making power of the Supreme Court of New Jersey (*ibid*), which has been exercised to establish disciplinary procedures, the importance which that Court attaches to its rule-making power has been declared in no uncertain terms. Winberry v. Salisbury, 5 N.J. 240, 74 A. 2d 406 (1950), cert. den. 340 U.S. 877, holds that the rule-making power within its proper province of practice, procedure and judicial administration is not subject to overriding State legislation. And see New Jersey State Bar Association v. Northern New Jersey Mortgage Associates, 55 N.J. Super. 230, 150 A. 2d 496, declaring that no statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law. It seems surprising that the Court below would depart from its own thus stoutly defended regularly established Court Rule procedures without explanation and apparently without warrant in law. To be sure, as we indicate in the text above, no federal question is presented by the Supreme Court of New Jersey's assumption as such of the powers to by-pass its own formal rules, but the problem becomes quite otherwise when, as here, the exercise of the power is claimed to work a denial of federal equal protection and due process as to a particular attorney.

Supreme Court of New Jersey for the disciplining of attorneys are interpretable as a matter of State law as allowing such by-passing (see our last preceding footnote), there persists the question of unconstitutional discrimination and unfairness under the Fourteenth Amendment equal protection and due process clauses, especially in view of the failure of the Court below to inscribe upon this record any reason or explanation for the by-passing in this instance.*

The right to practice law, once such right has been regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property and is safeguarded by the constitutional principles that apply in the protection of property lawfully acquired. A lawyer's license may not be revoked or suspended except in compliance with both substantive and procedural due process; nor is there any doubt that in a disciplinary proceeding a lawyer is entitled to the equal protection of the laws. These are Federal constitutional rights; these Federal constitutional requirements must be obeyed in State disciplinary proceedings against lawyers. E.g., *Spevack* v. *Klein,* U.S. , 17 L. Ed. 2d 606; *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96; *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232; *Konigsberg* v. *State Bar of California,* 353 U.S. 252, later appeal 366 U.S. 36. See also the *Annotation* in 98 L. Ed. 851-865, entitled "*Suspension or Revocation of Medical or Legal Professional License As Violating Due Process—Federal Cases*"; and the related *Annotation* in 6 L. Ed. 2d 1328.

---

* At pp. 17-20 of Brauer's petition for rehearing in the Court below he expressedly called attention to this omission from the record and urged the Court to supply the omission.

We realize full well that, in order to formulate *proper* and *substantial* Federal constitutional issues of equal protection and due process on behalf of the within petitioner it is necessary to demonstrate in a concrete way how petitioner was or may have been prejudiced by the procedures used in this case. That is, we realize it would be futile merely to pick away, on some abstract or academic basis, at the procedures used; and that it is necessary to show either that prejudice actually resulted or that intrinsically, under the specific facts and circumstances involved, it may have resulted in a sufficient degree of likelihood to make the matter one of Federal constitutional concern. We respectfully want this Court to know that we are not for one moment losing sight of our obligation not to impose upon this Court's time and labors with any merely frivolous or theoretical Federal constitutional issues. We believe our Federal constitutional issues are serious and substantial.

Turning, then, in a specific way to the question of how actual or sufficiently indicated prejudice arises on the present record by reason of the procedures used, let us begin by focusing attention on what one may term the ultimate *ratio decidendi* of the decision below condemning petitioner under the sole charge on which the Court found him guilty of unethical conduct—the charge involving petitioner's alleged solicitation of another attorney, Harold Teltser, to transmit a gambling-bribery proposal to Brendan T. Byrne, prosecutor of Essex County. What was this ultimate *ratio decidendi?* The case turned dispositively, as is evident from the portion of the opinion below numbered "III" (Appendix A, hereto, pp. A-16-A-20, *infra*), on the issue of credibility as between petitioner and Teltser. The issue of petitioner's guilt or innocence of this charge turned

entirely on the question of whether the more credible, or the more probatively reliable, account of the alleged bribery proposal incident came from the testimony of petitioner or from the testimony of Mr. Teltser. The conversation in which the bribery proposal was allegedly made by petitioner to Teltser was a conversation in which no one except those two individuals were present; no one else had any knowledge of what transpired in that conversation. Thus it was Mr. Teltser's word against petitioner's word. Or, the sole and dispositive issue under the sole disciplinary charge here involved is an issue which, while it would conventionally be termed an issue of credibility, is actually the grave issue of the respective basic character qualities of the accused attorney and his solitary accuser when the testimony of the accuser (who, one would have thought, had the burden of persuasion) is absolutely unsupported by anything in the record, and when the record likewise is not only wholly devoid of any "character" evidence one way or the other concerning petitioner but is also quite explicitly devoid of any confirmation of Teltser's charge notwithstanding the intensive investigation of the case conducted by the State police. In short, petitioner has been condemned in this case on the expressly declared ground (declared by the Court below, that is) that the trier of the facts (the Master) was justified in believing Teltser rather than petitioner. But again, the Master made this choice solely on the basis of his own credibility preference, there being (we repeat) no proof whatever in the record on the crucial question of the respective character qualities or credibility worthiness of Teltser as against petitioner.

Before we take up the further thread of our argument as to the concrete ways in which the factual setting of this all-

important credibility issue in the present case brings into operation (or should have brought into operation) the equal protection and due process provisions of the Fourteenth Amendment, let us observe one or two further aspects of the credibility problem as such:

It may tend to be overlooked that the judicial decisional process of the fact-trying, and the resolving, of an issue of credibility when it is one man's word against another's, is one of the most grave and difficult situations with which a judicial tribunal may ever be called upon to deal. This judicial credibility-trying function may tend to be thought of as being routine, or as being simple and easy, for a judicial trier of fact; we have all heard the expression lightly used that "it was merely a matter of credibility for the trier of the facts". But when we pause and reflect, we remember how painstakingly and elaborately over the course of centuries the law has developed stringent safeguards in the effort to prevent careless, or casual, or superficial, conclusions by judicial triers of issues of controverted fact. It is an often-heard remark in sophisticated legal discourse that our system of adversary judicial trial for the resolution of disputed issues of fact is merely *the least imperfect* system that our legal culture has thus far been able to devise for this purpose. Above all, the high judicial responsibility in resolving fact controversies calls for utmost procedural care when the controversy is presented in the anguishing form of one man's word against the other's.

Now, it seems to be clear from the way in which the history of the investigative or prosecutive history of the present case has unfolded, that the Court below was kept

closely apprised of those developments from the outset, and that indeed the Court exercised a quite direct supervision over all branches of the case from the outset. It would thus appear that the Court below must have been aware from at least an early stage of the case involving the Teltser charge against petitioner, that this was going to be a case of Teltser's word against petitioner's; the Court below was apparently aware, from Teltser's version of the happening given during the State police investigation which preceded the hearing before the Master, that the situation was one in which there would be no other witnesses on the subject of the charge in question except Teltser and the petitioner. Petitioner himself could not have known that such was going to be the probative structure; petitioner in fact did not know, in a manner of proper and adequate appraisal, just what he was facing until after the completion of Teltser's testimony before Judge Giuliano; but the Court below, apparently, did know that, again, it was going to be a matter of Teltser's word against petitioner's word *without more.*

In all respectful earnestness we submit that, in these circumstances, it was paramountly incumbent upon the authorities charged with the institution and the conduct of the disciplinary proceedings involving the within Teltser charge, to adhere in every possible way to procedurally optimum methods for resolving this grave and difficult type of issue of credibility and professional character. Above all, there should have been at least an utmost hesitation to proceed in any other manner except by the regularly established and well-tested procedures. The last thing the authorities in control of this matter should have done was

to employ atypical procedures, or procedural innovations, which predictably might prove to be in derogation of the protections available to the accused attorney under the regularly established disciplinary procedures.

The regularly established method which was available for trying out the Teltser charge was, of course, the County Ethics Committee procedure under Rule 1:16. This system of the County-by-County Ethics Committee has one unique quality which would appear to be indispensable for the proper safeguarding of the Federal equal protection and due process rights of an accused attorney, especially in a case of the present type where the sole issue is one of credibility pitched upon one man's word against another's. This unique quality in the County Ethics Committee system is that the members of each County Ethics Committee are, or can be, in a peculiarly informed position to judge the credibility of the accused attorney, in the sense of the traditional Anglo-American "vicinage" concept. As seen, the Rules of the Court below reflect throughout their numerous and detailed provisions an evident intention that attorneys faced with disciplinary charges shall have the benefit of being heard or tried in the first instance by fellow-attorneys who are members of the accused attorney's own "vicinage", as it were. This "vicinage" system has obvious importance above all where, as in the instant case and as we previously herein ventured to phrase it, the sole or dispositive issue under the particular disciplinary charge involved is the issue of the credibility, which is to say the issue of the basic character qualities, of the accused attorney as against the unsupported word of a single accusing witness.

The by-passing of petitioner's own regularly established County Ethics Committee—the Hudson County Ethics Com-

mittee—in the present case *ipso facto* deprived petitioner, in the very inception of the case, of the above described indispensable "vicinage" protection. As stated, the record contains nothing which explains or throws any light on the reasons for thus having deprived petitioner of his normal and regularly established disciplinary "vicinage" forum. So far as appears, petitioner was arbitrarily denied equal protection of the laws and due process of law under the Fourteenth Amendment by having been denied the regularly established disciplinary "vicinage". In practical effect, it appears to have been arbitrarily decided—arbitrarily both as to law and as to fact—that the trial of the issues of petitioner's credibility and character qualities, as against the credibility and the character qualities of the accuser (Teltser), should purposefully be taken out of the hands of the "vicinage" tribunal regularly established by law for the conduct of such trial.

We asked the Court below, in passing upon our petition for rehearing, to set forth upon the record its reasons or grounds for thus apparently having deemed it not fitting to have the present matter go before the Hudson County Ethics Committee; we especially asked the Court to announce those reasons or grounds on the record, if the reasons or grounds were ones which might reflect questioningly upon the Hudson County Ethics Committee, or upon petitioner, or upon any relationship or other facts supposed to exist, which might justify the Court's apparent choice in having deemed it unfitting to remit this matter for initial determination by the normal and regularly established forum of the Hudson County Ethics Committee; we expressly urged that it is of the very heart of our Fourteenth Amendment equal protection and due process contentions,

that we should thus request a specification by the Court below of its reasons for having apparently chosen to by-pass the regularly established Hudson County Ethics Committee forum in this case (Pet. Reh. 17-20).

The intrinsic unfairness of what was done here, in terms of equal protection and due process, may be further perceived in the following way. It would of course have been unthinkable to have sent petitioner to be tried before the Ethics Committee of Teltser's County. Sending petitioner to be tried before a specially designated Judicial Master in Teltser's own "vicinage" may have avoided any such overt breach of impartiality. But it is still impossible to see any justification on this record, in terms of constitutional fairness, for by-passing petitioner's own County Ethics Committee "vicinage"— most particularly so in view of the advance-known decisiveness of the single issue of credibility.

The Master's report and the opinion of the Court below are prominently concerned with the respective statuses of esteem or repute of petitioner and Teltser. Practically in so many words, the report and the opinion are saying, "We take Teltser's word over Brauer's because Teltser is someone whom we know to be a more high class individual than Brauer". In due process terms, this is insupportable. As previously noted, there is no character testimony in this record as to either Teltser or Brauer. To form "judicial" conclusions on the character of these two individuals in such circumstances is not only to go "outside the record", but in the most classic sense it is "judgment" without "trial" or "hearing". To be sure, this sort of thing is to some extent unavoidable in any judicial hearing, and doubt-

less it is more than normally unavoidable in professional disciplinary proceedings. But it is precisely for this reason that the local or County Ethics Committee System is so important; in that local forum or "vicinage" the accused attorney's repute and character are at least under scrutiny by men who are in a position to know him or to have reliable knowledge about him.

We respectfully emphasize that, in the theme suggested in the last preceding paragraph, the considerations of equal protection and the considerations of due process coalesce in an especially striking way. The perhaps unavoidable "judging" of professional "character" which may creep into professional disciplinary proceedings even when proof on the issue of character is absent from the record, raises an insistent if not an unanswerable reason in favor of adherence to a regularly established "vicinage" system of the type of the New Jersey County-by-County Ethics Committee system.

Another way of perceiving this same unfairness in having by-passed the Hudson County Ethics Committee in this case, and another way of seeing the coalescence of the equal protection and due process issues thereby raised, is to perceive that, in the nature of this country's basic system for the disciplining of attorneys, the highest Court of the jurisdiction involved which is charged with the final exercise of the disciplinary power may tend to become both accuser (or prosecutor) and judge. Is it not precisely because of this danger that the safeguards embodied in New Jersey's County-by-County Ethics Committee System with ultimate review by the Supreme Court of New Jersey, were provided—i.e., so as to separate the accusing and judging func-

tions? Not only in practical effect, but on the face of the record, the instant case is one in which from the outset the Court below itself, first through its specially appointed delegate, the Master, conducted both the investigative and the accusatory activities, and in the end conducted also the final judging activities. True, Courts frequently act through judicial masters. But in this case there appears to have been no justification for by-passing the duly and regularly established hearing body and setting up in its place a different hearing agency for which there appears to be no legal warrant, the result of all of which was an effective amalgamation of the accusatory and judging functions in a single body.

The petition for rehearing in the Court below requested a *de novo* reopening of the case *via* the Hudson County Ethics Committee in the regular manner, for the sake of both due process and equal protection (Pet. Reh. 23)—the equal protection issue being unconstitutional discrimination, the due process issues being separation of the functions of prosecutor and judge and relief from improper judgment as to character, and the ultimate claim of constitutional aggrievement being denial of the right to a fair and impartial tribunal and to a fair trial on the dispositive issue of credibility.

II

The topic to be reated under this "Reason" II has been referred to previously as one of the several incidents of unconstitutionality occasioned by the supplanting of the Hudson County Ethics Committee. For purposes of distinctness in presenting our Federal constitutional conten-

tions in this petition, we are setting up the following contentions under a separate "Reason".

It is hardly necessary to cite authority for the due process truism that no person may be subjected to an adverse judicial "judgment" without some evidentiary support. In recent years this Court has been obliged to devote attention to this elementary constitutional issue because, it seems, judicial standards do slacken or slip, even in matters of this fundamental nature. The cases are collected in the recent *Annotation* in 15 L.Ed.2d 889, entitled *"Lack Of Evidence Supporting State Conviction Of Criminal Offense As Violation Of Federal Due Process"*. The leading decision is *Thompson* v. *Louisville,* 362 U.S. 199, which first laid down what has come to be known as the "totally devoid of evidentiary support" rule. See also, *e.g., Shuttlesworth* v. *Birmingham,* 382 U.S. 87.

No reason appears why the "totally devoid of evidentiary support" rule which applies in State criminal prosecutions should not be applicable also in a State disciplinary proceeding against an attorney. The due process protections of the Fourteenth Amendment are fully applicable to such State disciplinary proceedings. Especially here, where the charge against petitioner Brauer amounts to a charge of crime, the above mentioned rule should operate.

It is therefore submitted that the judicial condemnation of petitioner Brauer's professional character and the judicial aspersions cast upon his professional repute in this case, denied to petitioner due process of law in violation of the Fourteenth Amendment, because the ultimate ground of decision on the dispositive issue of credibility turned upon pure assumptions as to the respective character quali-

ties of petitioner and the sole accusing witness, the record being wholly devoid of proof on any such issue of character.

In our petition for rehearing in the Court below (Pet. Reh. 26) we represented that in the event of the granting of that petition we would introduce character testimony; and that the issue of the character of the accusing witness would likewise be examined. We urged (*ibid*) that upon a new record in which the issue of the character of both of the individuals concerned were developed by proper proof, the entire decisional posture of the controlling issue of credibility would necessarily be altered, even if the new proofs should reveal nothing more than that both individuals possess unimpeachable character. For, in that event, and if the purely assumptive procedures by which the issue of character was previously resolved in this case could be avoided upon a new hearing, petitioner would at least have a fair chance for a traditionally proper due process adjudication on the word-against-word issue of credibility as between petitioner and Teltser. That is to say, even if such new hearing should result in nothing more than a "draw" or "stand-off" as between the two individuals in point of their character and credibility, petitioner would gain the benefit of being in a position to invoke the rule that he should not be found guilty of unethical conduct on merely equipoised proofs on the sole issue of credibility, for in that posture of proof it could not be said that the proof of petitioner's guilt would be "clear and convincing."

Nor is it by any means a foregone conclusion that a *de novo* evidentiary hearing in this case would leave the accusing witness unshaken. It would be improper for us to carry this latter suggestion any further in concrete terms on the present record, and we shall not do so in any

such concrete way. But it is proper for us to point out that intrinsic elements in the accusing witness's story offer authentic openings for a different judicial evaluation in the event that the probative materials now missing from this record on the issues of character and credibility were to be made available through a due process hearing. Once there is proof in this record that Brauer enjoys a reputation for excellent character and veracity, and even if nothing adverse to the character of the accusing witness should emerge, the door would necessarily be opened to the perfectly plausible hypothesis, for example, that the accusing witness, out of a concern over his own indiscretion in having spoken to Brauer (someone he barely knew and was meeting in person for the first time) about past corrupt offers made to prosecutor Byrne, might have panicked into blurting forth to his partner prosecutor Byrne, the next day, a hyperbolic version of what had happened so as to depict to Mr. Byrne that he (the accusing witness) had not committed such indiscretion under light circumstances but under a far graver provocation on Brauer's part. As we termed it on an earlier page, such an explanation is Dostoevskian, but Dostoevskian happenings are a common part of human life.

Surely, on the present record and in the light of the exceedingly dubious procedures used in this case, it is neither due process of law nor equal protection of laws to doom, after nearly thirty-five years of unblemished service at the bar, an attorney like Morris Brauer, on the *conclusive presumption* that vagaries of human personality functioning which classic literature and modern science make quite familiar, cannot possibly have been a factor in this case on the part of the accusing witness.

III

In view of the high value which the Federal Constitution attaches to the right of a lawyer to continue in the practice of the law, it is recognized throughout the American jurisdictions that an especially strict standard of proof must be met to support a charge of unethical conduct against a lawyer. This standard is customarily defined as that of "clear and convincing proof". E.g., *In Re Cohn*, 46 N.J. 202 (1966). The fair meaning of the "clear and convincing" rule in disciplinary proceedings against attorneys is that the burden of proving unethical conduct is one lying intermediately between the burden applied in a civil case and that applied in a criminal prosecution. Although the rules of presumption of innocence and proof of guilt beyond a reasonable doubt may not be applicable strictly speaking in disciplinary proceedings against attorneys, the standard of the "clear and convincing" rule plainly means that proof of a charge of unethical conduct must be of a distinctively exacting kind and weight, reflecting the solicitude with which Anglo-American jurisdiction have traditionally regarded the right of a licensed attorney to pursue his profession, and the recognized need of protecting attorneys against ill-considered, unreliable or inconclusively proven charges.

In this particular case, where the charge amounts to a charge of crime, the case for applying a strict standard of proof is *a fortiori*.

On the present record the test of "clear and convincing" can be said to be met only if one accepts as being also "clear and convincing" the *non-record* and *non-proved* "facts" as to the respective character qualities of petitioner and

of the sole accusing witness, these assumed and unproved respective character qualities having been the integral and indispensable element, as seen, in the decision of the dispositive issue of credibility.

By reason of the manifest error and injustice in the conclusion reached in this case to the effect that this record contains "clear and convincing" proof of petitioner's guilt, petitioner has been denied the equal protection of the laws and due process of law through having been denied his right to a fair and proper application of the established standard of proof. Moreover, it respectfully seems to us sound to view this standard of proof in disciplinary proceedings against attorneys as reflecting an aspect of the principles of *substantive* due process which must apply in such proceedings, i.e., that in any case of the disciplining of an attorney the record must demonstrate a reasonable relation between the charges and the proof thereof on one hand, and the legitimate public concern in enforcing standards of professional fitness on the other hand. We submit that this is a proper case in which to enforce the latter substantive due process requirement on the sheer ground of egregious insufficiency of proof and likewise egregious violation of procedural due process. This is a case, in short, where substantive and procedural due process merge, because the Constitution, in the most fundamental sense, cannot tolerate that a member of the bar shall be practically expelled from the profession in the interests of maintaining fitness when the supposed demonstration warranting such a drastic result falls so far below judicially and constitutionally acceptable standards.

Perhaps our above argument in terms of substantive due process is supererogatory; perhaps procedural due process

considerations cover the points we are here making without resort also to the substantive due process formulation. We realize that analogy to the substantive due process formulation as it operates in judicial review of legislation cannot quite succeed here. That is, the familiar substantive due process formulation in passing upon legislation—to the effect that if facts could exist which would make the legislation reasonable it will be assumed that they did exist—logically falls short here, we realize, since the adaptation of that formula here must of course result in the conclusion that if the decision of the Court below placing credence in Teltser rather than in Brauer could be correct it will be assumed that it was correct, whereupon the discipline imposed would be "reasonable" as a matter of substantive due process because, needless to say, an attorney who does what Brauer is here accused of having done is subject to discipline as being professionally unfit. We nevertheless respectfully urge that here the vices of inadequate due process procedure are so extraordinary that New Jersey's virtual professional death sentence against Morris Brauer amounts to a perversion of the State's power to regulate the practice of the law in a degree transcending procedural injustice and amounting to an excess of the State's substantive constitutional jurisdiction.

IV

As seen, this disciplinary proceeding did not really reach the stage of "charges" until the Court below issued its final order to show cause—or, at any rate, until the Master rendered his report. As also seen, it was repeatedly urged by counsel for the respondent attorneys in this case, in the hearings before the Master, that they felt themselves to be

under severe procedural difficulty and uncertainty in view of the fact that at that stage there were apparently no "charges" involved. Most of the colloquy on that subject, in the hearings before Judge Giuliano, occurred in connection with the phases of the case on which petitioner Brauer has been found not guilty; but the problem was brought up also by Brauer's counsel, Mr. Van Riper at the commencement of the hearing of March 25, 1966, which dealt with the Teltser matter (pp. 3-4).

At the oral argument in the Court below counsel for Mr. Krieger spoke about this problem, and the Court offered an opportunity at that time to Mr. Krieger to reopen the hearing, which was not pursued.

In his petition for rehearing in the Court below (Pet. Reh. 30) Brauer requested such opportunity with respect to the Teltser charge; and he prayed that his prior failure to request such opportunity not be treated as irremediable. He further prayed that the Court, in the event of denial of this petition for rehearing, should treat the request as having been entertained and denied on the merits, for the purposes, as previously explained, of enabling us to incorporate the issue as a due process contention in petitioning for certiorari in this Court; and the petition for rehearing was entertained and denied on the merits. The emphasis on the investigative as distinct from any accusatory character of the proceedings before the Master had, from a practical standpoint, the inevitable tendency of causing Brauer to contract rather than to expand his own affirmative presentation and even his examination of witnesses called by Mr. Bergin.

Due process and simple fairness favor giving petitioner Brauer a renewed opportunity to defend himself against the Teltser charge.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Petitioner
Morris Brauer

APPENDIX A

Opinion of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

D-3/4 September Term 1966

In the Matter of

HAROLD KRIEGER and MORRIS BRAUER,
Attorneys-at-Law of New Jersey.

Argued September 27, 1966—Decided Nov. 21, 1966.

On orders to show cause why respondents should not be disciplined.

MR. JOHN J. BERGIN, for the order.

MR. ROBERT B. MEYNER argued the cause for respondent Krieger (MESSRS. SAMUEL A. LARNER and WILLIAM P. VERDON, of counsel; MESSRS. MEYNER AND WILEY, attorneys).

MR. WALTER D. VAN RIPER argued the cause for respondent Brauer (MESSRS. VAN RIPER AND BELMONT, attorneys).

The opinion of the Court was delivered.

PER CURIAM.

These are disciplinary matters. Respondents, Harold Krieger and Morris Brauer, are charged with unethical conduct with respect to the theft of a file from a court-

appointed officer and the preparation and submission to a trial court of a forged paper prepared from material in the stolen file. The conduct related to a civil suit to which we will presently refer. Krieger is separately charged with initiating a criminal prosecution against a witness for the purpose of achieving a favorable result in that civil action. Brauer is charged separately with seeking to induce a member of the Bar to transmit a corrupt proposal to the Prosecutor of Essex County, which conduct is not related to the civil suit above mentioned.

The charges were referred to Judge Giuliano as a master for trial. Following his report, we issued the orders to show cause now before us.

I.

The civil action mentioned above involved the ownership of a corporation. Krieger represented the plaintiff, Gershon Shugar, while Jerome C. Eisenberg represented defendants David Perlstein and Wilbur Perlstein. Shugar and David Perlstein are married to sisters of respondent Brauer. Shugar and David Perlstein each held of record 50% of the stock of the corporation, but Wilbur Perlstein claimed he was entitled to a one-third interest and he was supported in that claim by his brother, David. Although not counsel of record in that case, Brauer worked actively with Krieger in the interest of Shugar.

The parties continued to run the corporate business during the litigation despite the ferocity with which it was waged, but being unable to agree upon operational decisions, they stipulated that John Drewen, a retired judge of

the County Court, should arbitrate disputes in that area. Later Judge Drewen was appointed to that role by the trial court and he served until relieved at his own request on May 8, 1964.

The trial of the civil suit, which consumed 19 days, ended on September 21, 1964. Judge Matthews, the trial judge, filed his opinion in favor of Wilbur Perlstein on June 2, 1965. One week later Judge Drewen's secretary discovered his files with respect to that matter had been stolen. On June 16 Judge Drewen advised Judge Matthews of that fact.

Krieger received four envelopes through the mail, three postmarked respectively June 14, 19, 24, 1965, and the last apparently also postmarked in the same month. The enclosures therein purported to be reproductions of letters from Eisenberg to Judge Drewen and from Eisenberg and Judge Drewen to Mortimer C. Low, the accountant for the corporation.

The letters reproduced and transmitted in the first three envelopes were innocuous. Krieger brought one or more of them to Judge Matthews. The fourth envelope contained eight reproductions, one of which, purportedly written by Eisenberg to Judge Drewen under the date May 20, 1965 and marked "Confidential," reads:

> "Recently, it was necessary for me to tell David Perlstein, and reassure him three times, that he should not be impatient; that Judge Matthews informed me that the factual decision would be released in early June, a complete victory on all our issues. When our depraved friend down your hall receives it, he will have reason to then fulminate.

> Assuring you of our appreciation for your untiring efforts throughout the entire proceedings, I know a call from you to David would instill the patience he now requires."

When Krieger brought the last batch to Judge Matthews on July 2, 1965, Judge Matthews summoned Eisenberg and then informed all counsel of the theft of Judge Drewen's file. Eisenberg was shown the letter quoted above and he immediately denounced it as a fraud. Judge Matthews telephoned the Chief Justice who directed that all the exhibits be impounded, subject to access by experts designated by any of the parties, and that the matter be referred to the Attorney General for investigation.

Eisenberg and Krieger each had the questioned letter examined by an expert of his own selection. Eisenberg testified his expert found it to be a forgery, the quoted portion of the letter being a fabrication placed upon an old letterhead and then photographed. We are told by counsel for Krieger that his expert was unable to say whether the document was fabricated. We cannot understand how an expert could be in doubt if he was shown all of the exhibits. As Eisenberg's expert noted, the signature "Jerry" on the disputed document coincides precisely with the signature on a genuine letter from Eisenberg to Judge Drewen, dated October 25, 1963, a reproduction of which was contained in the same envelope in which the disputed document was transmitted to Krieger, thus showing that the genuine signature on the October 1963 letter was either itself used or was traced in preparing the fabricated letter. The fact of forgery is thus indisputable, and hence we need not relate the additional proof which would independently require that same finding.

The New Jersey State Police conducted the investigation. It developed that one of the four envelopes mailed to Krieger was addressed on a typewriter in his office and that one of the reproductions was made on a Xerox machine in his office. However, neither the forged letter nor the envelope in which it came was traced to Krieger's office or to the other places inspected, which included the offices of Eisenberg, Brauer and Shugar.

Confronted with the fact that his office equipment was involved, Krieger, according to Detective Pagano, seemed genuinely surprised and blurted "Morris Brauer." We note that Judge Drewen, Krieger and Brauer had their offices in the same building. Krieger produced an employee who said that Brauer used his Xerox machine in June of 1965. This Brauer denied. Krieger offered evidence that Shugar had used the Xerox machine and this Shugar testified was true. Finally, Krieger offered testimony that he "passed" a lie-detector test conducted by the State Police. The other men mentioned, Brauer, Shugar, and Eisenberg, had also submitted to such tests voluntarily.

Brauer offered no evidence beyond his own denial of complicity or knowledge.

Judge Giuliano found in favor of the respondents with respect to the theft, the forgery, and the use of a known forgery. We nonetheless issued our orders to show cause.

A.

We interrupt the discussion of the merits to comment upon the contention pressed by Krieger in his brief that the procedure here used did not afford him due process.

In this regard, Krieger notes that the order of reference provided that Judge Giuliano "shall act as an Ethics Committee and shall have all the powers conferred upon such a Committee by Rule 1:16." The point he makes is that under Rule 1:16-4, a member of an ethics committee first conducts an *ex parte* "preliminary investigation," and thereafter the committee decides, upon a consideration of the report of the investigator, whether to close the matter (subject of course to our ultimate review) or to set it down for final hearing. Here the preliminary investigation was had before the reference was made to Judge Giuliano. The investigation was made by the State Police, and upon its report we decided that a formal hearing was warranted. There was no reason to ask a member of an ethics committee, or someone designated by Judge Giuliano, to duplicate the investigation already made and considered by us. Thus there was no departure from the essentials of the procedure an ethics committee would follow. Rather, having decided that the matter was one to be investigated by a law enforcement agency and then tried before a judge, we followed steps equaling the regular ethics procedure.

The order of reference to Judge Giuliano was made on January 12, 1966. The first date of hearing, fixed by Judge Giuliano, was Monday, February 14. By letter to the Clerk of our Court dated February 8, counsel for Krieger said he assumed the most that could emerge from the hearing before Judge Giuliano would be specific charges to be heard at a later date. By letter dated February 15, the Clerk informed counsel that "this will be the final hearing in the matter and that if you feel the charges are not sufficiently specific

you should ask for a bill of particulars from your adversary." This letter was received by counsel while the hearing before Judge Giuliano was in progress and counsel noted his receipt in the transcript.

The order of reference designated Judge Giuliano "a Master of this Court for the purpose of conducting an investigation and hearing to *determine*: (1) whether Harold Krieger and Morris Brauer, attorneys at law of this State, or either of them, are *guilty* of unethical and unprofessional conduct in connection (a) with the alleged theft of a file from the office of John Drewen, also an attorney at law of this State, and (b) with the alleged preparation and submission to Superior Court Judge Robert A. Matthews of an apparently forged paper." We have underscored the words "determine" and "guilty" which we would think should have advised Krieger that the hearing was not a mere preliminary inquiry. And of course it was not appropriate to seek to resolve a doubt in that regard by the medium of a letter to the Clerk of the Court written so close to the date set for hearing.

Upon our inquiry at the oral argument we were told that respondent was entitled to more detail as to precisely how he was connected with the theft and the preparation of the forgery. We do not understand why a member of the Bar would need a specification of that kind. The range of the charges was quite limited. A lawyer would be guilty of unethical conduct if (1) he stole or conspired for the theft of the file; or (2) prepared or conspired for the preparation of the forged paper; or (3) knowing the paper to be forged, submitted it to the court as genuine or pos-

sibly genuine. All of this was clearly implicit, and we see no reason why the prosecution had to choose in advance from among those theses.

Nor could an omission so to choose place an unfair burden on the defense either as to preparation or as to trial. The fact is that the matter was tried fully by Krieger as to all of the facets we have just listed. We asked his counsel what more he would have done, either by way of preparation or at trial, and he stated frankly that he could think of nothing except that perhaps he would have had an expert examine the envelope and the reproduction tied into Krieger's office. But the opportunity thus to deal with all exhibits was assured when they were first impounded, and in fact counsel for Krieger tells us that Krieger had the disputed letter examined by an expert. Further, at the argument we offered him a fresh opportunity for such examination or to reopen the hearing for further examination, direct or cross, and invited counsel to advise us seasonably if that opportunity were wanted. No such request has been made.

Accordingly we see no substance to the claim that procedural due process was denied. We return to a consideration of the merits.

B.

There can be no doubt that Shugar or someone allied with him is guilty. The impulse could not reasonably be thought to have come from any other source. As to Krieger, the fact is that equipment in his office was used to prepare two of the exhibits in the case—the envelope

postmarked June 24 and a Xerox reproduction of a letter transmitted in one of the envelopes. The inculpatory thrust of that circumstance is strong. To it may be added the fact that Krieger made no inquiry of Judge Drewen notwithstanding that the reproductions of original letters addressed to Judge Drewen were likely prepared from his file. As to this, Krieger says he assumed someone in Eisenberg's office prepared the copies before the originals were mailed, but that hypothesis would not explain a reproduction of a letter from Judge Drewen to Low (undoubtedly surreptitiously taken from Low), and in any event, a call from Krieger to Eisenberg would seem in order if Krieger, as he professes, was mystified by it all. Finally, although of course the mere fact that Krieger represented Shugar would not be inculpatory in the least, the unfortunate fact is that Krieger did share the animosity of his client, as is evident from Krieger's behavior with respect to the second charge against him, discussed hereinafter.

Krieger offered no evidence to explain the direct proof against him. He went no further than to point a finger of suspicion at Brauer and Shugar by offering testimony that each of them had used the Xerox machine. But why would the culprits, whoever they are, covertly use Krieger's equipment? It is plain that other equipment was available to them both before and after Krieger's machines were used. This is so because the envelope typed in Krieger's office was postmarked June 24 and thus was the third in the series of mailings, and all the reproductions, except one, were made on other machines. Other equipment being at hand, it would seem to follow that in using Krieger's equipment the culprits deliberately created evidence

against him. If evidence was thus planted against Krieger, the probable reason would be either that Krieger was involved and his confederates wanted to be sure he would not extricate himself alone if the plan failed, or that Krieger, although not involved in the theft or the forgery, knew who was and hence the planted evidence would serve to silence him.

The first hypothesis would presuppose Krieger's guilt and thus not help him, while the second hypothesis would assume his innocence of the specific charges here involved. The second hypothesis is consistent with the proof. It could be that Krieger was surprised to learn that he had been duped into transmitting a forgery to Judge Matthews. As we have said, Krieger did seek the opinion of an expert as to whether the exhibit was genuine despite Eisenberg's denunciation of it, and if we assume that engaging an expert was not merely theatrical, it would indicate that Krieger really believed the letter was authentic. And Krieger's exclamation, "Morris Brauer," when Detective Pagano confronted him with the fact that his equipment was used, suggests Krieger knew more than he was willing to tell.

Krieger of course does not project the second hypothesis we have just discussed. Nor could he safely, since although it would relieve him of the specific charges of complicity in the theft, forgery, and use of a known forgery, it would leave him accountable upon another score. We have pursued this possible view of the evidence only in our search for some rational explanation, if one may venture to deal rationally with this picture, consistent with Krieger's innocence of the specific charge here involved. The thesis

we have just described seems to be the only likely one, although, as we have said, it would leave Krieger tainted in another respect.

Judge Giuliano decided he could not conclude the evidence established Krieger's guilt of the charge here involved. Since he had the advantage of seeing the witnesses, we are not inclined to hold the other way. Hence we will accept the proposition that doubt exists as to Krieger's guilt and dismiss the order to show cause on that basis, but, we are obliged to add, this does not mean that we are completely satisfied of his innocence. We are not. On the contrary, he remains in the shadows of this brazen affair.

With respect to Brauer, the record cannot support a finding of guilt as to this charge.

II.

The second charge against Krieger arises out of a criminal prosecution he initiated against Mortimer C. Low, the accountant for the business described above. The allegation against Low was false swearing based upon an alleged inconsistency between testimony in a pretrial deposition and testimony at the trial.

The deposition was taken on May 14, 1964. Low testified before Judge Matthews on September 21, 1964, the last day of the trial. On September 23, 1964 Krieger wrote a letter to the Prosecutor of Hudson County, bringing the matter to his attention. The letter was brief, and enclosed were the portions of the transcripts of the deposition and trial which supposedly contained the conflicting testimony. On

October 5 the matter was presented to the grand jury, and an indictment was thereafter returned. As mentioned above, the trial judge had reserved decision; and the case was decided the following June. The indictment was dismissed on motion in July, on the ground that there was in fact no conflict in Low's testimony.

Judge Giuliano's report reads:

> "The Court concludes from all the evidence that Harold Krieger assisted, cooperated and participated in a criminal proceeding against Mortimer C. Low in order to obtain an advantage in the court action entitled Shugar v. Perlstein, et al, which was still pending and awaiting the decision of Judge Robert A. Matthews. This conduct on the part of Harold Krieger is in violation of Canons 15 and 18 of Canons of Professional Ethics."

As already stated, the indictment was dismissed because there was no conflict in the testimony. Judge Giuliano made the same evaluation of the record, and we agree with it. In brief, the situation was this: The subject of Low's testimony was the formation of another corporation in which all three of the litigants had an equal interest. Low had submitted an unsworn statement to Internal Revenue Service setting forth the reasons for that incorporation. In his deposition, Low testified as to what he had told Internal Revenue, but he did not make a fresh assertion in the deposition as to the truth of that statement. At the trial he said that a reason contained in that statement to Internal Revenue was not a reason for the incorporation. Thus his trial testimony departed, not from his deposition, but from

the statement to Internal Revenue. However, Krieger asked Low, "So that your testimony in depositions was not true, is that correct?" and Low erroneously agreed with that erroneous appraisal. The testimony as set forth in the indictment created a semblance of inconsistency but only because an excerpt from the deposition was taken out of context, thereby obscuring the fact that Low was merely relating the content of the statement to the revenue service.

Thus there was no basis for the criminal charge. At most, the situation was fuzzy because of the manner in which the examination at the deposition was conducted, and the fuzziness was such as to bar a charge of crime. *State* v. *Browne*, 43 N. J. 321, 323 (1964). Krieger having been a magistrate in Jersey City for some years, one would expect him to be perceptive in such matters. He insists however that there was a conflict between the trial testimony and the deposition. Perhaps he thought so because he was too involved in his client's emotions to think clearly. In any event we cannot reject Krieger's assertion of his belief, although, as we have said, we think it was groundless.

Believing that Low had given false testimony, Krieger says he felt a burden to do something about it because of this sentence in Canon 29:

> "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."

If this provision applied, it would not apply to Krieger alone, for it is not limited to perjury of a witness adduced

by one's adversary. Thus Krieger should not have supposed he alone was singled out for action. In any event, this provision could hardly be understood to apply to a contradiction made in open court. In such a situation it would lie with the judge to refer the matter for prosecution if the public interest so required, and a lawyer (situated either as was Krieger or Eisenberg) who did nothing in the face of the judge's inaction would not be guilty of unethical conduct.

Here Judge Matthews was not moved to refer the matter to the Prosecutor. Judge Matthews did not see an inconsistency between the trial testimony and the deposition, and in any event deemed the conflict with the statement to Internal Revenue to be trivial at least so far as it related to the case before him. Krieger nonetheless says he felt a professional compulsion to act, and went to see Judge Matthews, not however for advice or instruction, but merely to tell Judge Matthews that he was going to turn the matter over to the Prosecutor. Judge Matthews, understanding that Krieger sought no instruction, nonetheless tried to dissuade him from his course. He made it plain to Krieger that he thought a criminal charge was unwarranted, cautioning him in the vein that "You do what you want, but be careful" or "Don't do something you will be sorry for." Despite this, Krieger went his intended way.

Under these circumstances we cannot credit Krieger's claim that he alerted the Prosecutor because he felt honorbound to do so. We are satisfied and agree with Judge Giuliano that Krieger invoked the criminal process in the hope that an indictment of Low, a key witness, would make

it difficult for Judge Matthews to rely upon Low's testimony in deciding the civil case.

What happened thereafter is a bit of a mystery, but Low was indicted with remarkable dispatch. Krieger says he did no more than dictate a letter to the County Prosecutor, and denied he talked with the Prosecutor at all. An examination of the letter and envelope shows they were hand-delivered, but no one could say by whom. The letter being rather cryptic, as we have said, it is inconceivable that no conversations accompanied it. The Prosecutor originally thought Krieger discussed the matter with him but before Judge Giuliano the Prosecutor could not be sure. We know from Judge Matthews and the Prosecutor that the Prosecutor personally visited Judge Matthews to inquire as to whether Krieger's letter and the transcripts accompanying it were *factually* correct, and of course Judge Matthews told him they were, adding, "this is a family affair." Someone printed on the envelope received from Krieger the notations "Special" and "False swearing." A written direction was given to the assignment clerk on the Prosecutor's staff that "This is an added matter for G. J. on 10/5/64." The matter was presented on that date, thereby receiving priority over some 412 cases then awaiting presentation to the grand jury. The explanation offered is the ease with which it could be handled, *i.e.*, the testimony of two court stenographers.

After the indictment was dismissed, someone requested the Prosecutor to take an appeal. The Prosecutor declined so to do. When he talked with Detective Pagano, the Prosecutor said it was Krieger who made that request, but

before Judge Giuliano he could not recall who it was. Judge Giuliano felt compelled to comment that the Prosecutor "was evasive and uncooperative and was of no assistance to the Court in ascertaining what had transpired between himself and Harold Krieger relating to the matter of Mortimer C. Low."

We have no doubt that Krieger, who, as we have said, was formerly a magistrate in Jersey City, used his local influence to have this matter presented quickly, to the end that Judge Matthews, who then had the main case under advisement, would be faced with the problem of accepting Low's testimony while Low was under indictment for false swearing. We accordingly agree with the finding of Judge Giuliano that Krieger is guilty of unethical conduct. An order will be entered suspending him from the practice of law for a period of three months.

III.

The separate charge against Brauer involves a solicitation of Harold Teltser to transmit a corrupt proposal to Brendan T. Byrne, Prosecutor of Essex County. Teltser is a partner of Byrne in private practice. Judge Giuliano found the charge was true. The testimony clearly requires that conclusion.

Teltser represented Edward Rabin who sought a loan from Julius Steinberg, a client of Brauer. Teltser had never met Brauer. Teltser testified that in their telephone conversations with respect to their clients' transaction, Brauer several times asked to meet Teltser alone. Teltser had no

idea of Brauer's purpose, and assuming that it related to the loan transaction, he informed Rabin of Brauer's request for a private meeting. Several appointments to that end were canceled for one reason or another. Teltser and Brauer finally met with their clients at Steinberg's home, where papers Teltser had prepared were discussed.

This is Teltser's version of what happened: During the meeting, Brauer asked to see Teltser alone, and they entered another room. Brauer asked Teltser if he talked with Brendan Byrne, to which Teltser replied that of course he did. Brauer then asked what the trouble was with Byrne, and whether Byrne did not like money. Brauer said he represented interests that wanted to run a plush dice game in Essex County, that the Attorney General and the local police were taken care of, and Byrne was the sole obstacle. Teltser was stunned by the proposal, and told Brauer that Byrne was unapproachable. Brauer persisted in asking that Teltser transmit the message to Byrne, and Teltser, not knowing how else to end the unpleasant conversation and fearful that if he were blunt, Brauer in resentment might spoil the transaction the clients were still negotiating, said he would convey Brauer's message to Byrne. Teltser had no such intention, and was not at the moment certain whether he would report the incident to Byrne, but on reflection decided he should, and he did. Byrne notified the Attorney General who in turn informed the Court. We add that since Teltser had told Rabin before the meeting that Brauer had sought to meet privately with him, he told Rabin, after the meeting at Steinberg's, that the conversation with Brauer did not concern the transaction between Rabin and Steinberg. Rabin so testified.

Brauer admitted that he talked with Teltser about meeting alone prior to the night in question but said his purpose was only to learn more about Rabin and the soundness of the loan his client was to make. He denied, however, that he initiated the calls, saying it was Teltser who called to press the deal to a conclusion. At any rate, they met for the first time with their clients at Steinberg's home. Brauer says that when the clients began to discuss the rate of interest, he suggested that he and Teltser leave, because he thought neither of them should be burdened with the clients' understanding on that subject. He says that as they entered another room, he told Teltser he knew Madeline Christianson, who is the mother-in-law of Teltser's brother; that he mentioned that Mrs. Christianson was unhappy about the way Byrne had handled a matter for her, and said that she thought Byrne's conduct was unethical, whereupon Teltser responded with a spirited defense of Byrne's character, in the course of which Teltser said that Byrne, among other things, had spurned efforts by gambling interests to bribe him. This, said Brauer, was the sole reference to gambling and bribery.

Teltser denied that there was any reference to any grievance allegedly held by Mrs. Christianson, and says that Brauer mentioned Mrs. Christianson only when he and Brauer were introduced at the Steinberg home and then only casually and in pleasant terms.

Judge Giuliano summed up his findings this way:

> "In weighing the testimony of Morris Brauer, this Court finds it difficult to believe his version of the

events which took place in the den on the evening of October 19, 1965. The Court was not impressed with the witness, Morris Brauer. His testimony lacked candor and was wholly improbable and unbelievable.

Harold Teltser is a highly regarded and well respected member of the Bar since 1952. His attitude and demeanor as a witness strikes this Court as being one of complete candor and fairness, and his testimony is credible beyond question. It is apparent to this Court that while he disliked his role, he knew his obligations as an attorney. His account of the conversation in the den was lucid, coherent and truthful. He was not confused as contended by Morris Brauer. This Court further concludes from the evidence that Harold Teltser believed Morris Brauer's proposal to be serious and not in jest.

On the other hand, this Court finds that Morris Brauer's version of the conversation in the light of human experience did not have the same qualities. It would be incredible that an attorney upon meeting a brother attorney for the first time would indirectly accuse his firm of 'fishy or unethical dealings.'

Morris Brauer's testimony of Harold Teltser's impassioned defense of Brendan T. Byrne's integrity borders on a *non sequitur*. Harold Teltser's account that Mrs. Christianson was casually mentioned in the beginning of the evening makes much better sense.

To believe the testimony of Morris Brauer would be in effect saying that Harold Teltser deliberately lied, or was mentally unbalanced, or of such vicious bent as to deliberately destroy a fellow attorney. In view of the testimony before this Court, none of these possibilities exist.

> This Court is satisfied that Morris Brauer attempted to induce Harold Teltser, a member of the Bar, to transmit a corrupt proposal to Brendan T. Byrne, Prosecutor for Essex County."

We agree with those views. We add that counsel for Brauer pressed several points before us, none of which in our judgment militates against the conclusion Judge Giuliano reached. It is stressed that the State Police found no evidence of involvement of Brauer with gambling interests. In the nature of the subject, a failure so to find has little meaning. Next it is pointed out that Brauer did not contact Teltser again. This is completely consistent with guilt, for if his effort were fruitful he would expect Teltser to call whereas if it were not, arrangements likely would have been made to record any further conversation. Finally, counsel urges that if Teltser's testimony be accepted, it should be concluded that Brauer spoke only in jest. We see no basis for that hypothesis since Brauer himself denies any such conversation and Teltser had no doubt as to Brauer's serious intent.

The remaining question is what discipline should be imposed. Under all the circumstances we believe it appropriate to order a suspension for a period of three years and until the further order of the Court, with the proviso that upon application for reinstatement there will be a full examination into respondent's ethical fitness for the Bar.

IV.

As to the charge against respondents Krieger and Brauer considered in Part I of this opinion, the order to show cause is dismissed. For the reasons given in Part II of this opinion, an order will be entered suspending Krieger for three months. For the reasons given in Part III of this opinion, an order will be entered suspending Brauer for three years and until the further order of this Court.

APPENDIX B

Report, etc. of Master

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF

HAROLD KRIEGER and MORRIS BRAUER,
Attorneys-at-Law.

REPORT
and
FINDINGS OF FACT

Hearing: February 14, 15, 17, 1966
March 24, 25, 1966

Report Filed: June 20, 1966

Appearances:

MR. JOHN J. BERGIN,
Assistant to Court.

MR. SAMUEL A. LARNER,
for Harold Krieger, Respondent.

MR. WALTER D. VAN RIPER,
for Morris Brauer, Respondent.

GIULIANO, J.S.C., Master of the Supreme Court

The Supreme Court of New Jersey, by an order dated January 12, 1966, designated this Court as a Master of the

Supreme Court for the purpose of conducting an investigation and hearing to determine: (1) whether Harold Krieger and Morris Brauer, Attorneys-at-Law of this State, or either of them, are guilty of unethical and unprofessional conduct in connection with (a) the alleged theft of a file from the office of John Drewen, also an Attorney-at-Law of this State, and with (b) the alleged preparation and submission to Superior Court Judge Robert A. Matthews of an apparently forged paper; and (2) whether Harold Krieger is guilty of unethical and unprofessional conduct in connection with the matter of a criminal complaint against one Mortimer C. Low.

Additionally, the Supreme Court ordered that this Court be designated as a Master of the Supreme Court for the purpose of conducting a hearing to determine whether Morris Brauer is guilty of unethical and unprofessional conduct in seeking to induce another member of the Bar to transmit a corrupt proposal to Brendan T. Byrne, Prosecutor of Essex County.

The Supreme Court further ordered that John J. Bergin, an Attorney-at-Law of New Jersey assist this Court in the conduct of said investigation and hearing.

Pursuant to the orders of the Supreme Court of New Jersey aforesaid, hearings were conducted by this Court in the presence of both respondents and their respective attorneys, Samuel A. Larner, Esq. for Harold Krieger, and Walter O. Van Riper, Esq. for Morris Brauer. Testimony was taken February 14, 15, 17, 1966 and March 24, 25, 1966.

Appendix B—Report, etc. of Master

I

The John Drewen File Matter

Harold Krieger and Morris Brauer

For several years prior to 1963, Gershon J. Shugar, David Perlstein and Wilbur Perlstein operated a business known as Rona Laboratories, Inc. The records indicate that the corporation consists of three stockholders, Gershon J. Shugar—19 shares, Helen B. Shugar—1 share, David Perlstein—20 shares, and that the Board of Directors consists of Gershon J. Shugar, Helen B. Shugar and David Perlstein, and that David Perlstein is President and Gershon J. Shugar is Secretary-Treasurer. From the inception of the business, all proceeds were divided on a three-way basis. During the conduct of the said business there arose a great deal of animosity between Gershon J. Shugar and the Perlsteins. However, the business prospered.

In March 1963 a suit was instituted by Gershon J. Shugar and Helen B. Shugar, individually and as stockholders of Rona Laboratories, Inc., a corporation, against David Perlstein and Wilbur Perlstein, Rona Corporation, Rona Pearl Corporation, and Rona Sea Products Corporation. The action sought to prevent a claimed attempted dissolution of Rona Laboratories, Inc., a declaration of the rights of the plaintiffs and the various corporations with respect to certain assets of the defedant corporations, and for an accounting as to the alleged dissipation of certain assets of the Rona Laboratories, Inc. by the defendants, David Perlstein and Wilbur Perlstein. The defendant, Wilbur Perlstein filed a counterclaim in which he sought to establish of

record his ownership of a one-third stock interest in Rona Laboratories, Inc.

Under the procedure suggested by Judge Robert A. Matthews, the action proceeded by trial of the counterclaim while the issues raised in the complaint were held in abeyance. The trial consumed 19 trial days and the testimony was completed September 21, 1964.

On June 2, 1965 Judge Robert A. Matthews rendered his opinion holding that the plaintiff, Gershon J. Shugar and the defendants, David Perlstein and Wilbur Perlstein during the operation of the business each regarded the other as equal owners of Rona Laboratories, Inc. and that Wilbur Perlstein was a stockholder and a one-third owner of the assets of Rona Laboratories, Inc. This determination by the court either disposed of or rendered moot the issues raised in the complaint.

During the pendency of the suit, many problems arose between the parties on a day-to-day basis as to the conduct of the business of Rona Laboratories, Inc. and it was decided between the attorneys representing the parties that John Drewen be retained as arbitrator for Rona Laboratories, Inc. Mr. Drewen continued as arbitrator until he was relieved by the court on May 8, 1964. As arbitrator he accumulated a large file which was maintained in his office.

The individual parties involved in this litigation and Morris Brauer frequently visited Mr. Drewen's office in connection with his duties as arbitrator. The office of Mr. Drewen is located at #921 Bergen Avenue, Jersey City,

New Jersey, in which building Harold Krieger and Morris Brauer also maintain their respective law offices.

On June 9, 1964, Mr. Drewen was advised by his secretary that the file of Rona Laboratories, Inc. was missing, and on June 16, 1965 a report of the missing file was made to Judge Robert A. Matthews.

With the exception of the allegation against Morris Brauer involving Brendan T. Byrne, Prosecutor of Essex County, this entire matter emanated from the civil action entitled Shugar v. Perlstein, et al, tried in the Superior Court of New Jersey, Chancery Division, before Robert A. Matthews, J.S.C. Harold Krieger was counsel for the plaintiff, Gershon J. Shugar, and Jerome C. Eisenberg represented David Perlstein and Wilbur Perlstein. Morris Brauer is the brother-in-law of both plaintiff, Gershon J. Shugar, and defendant, David Perlstein. Mr. Brauer took an active interest in the entire matter although he was not listed as attorney of record.

As previously stated, during the pendency of the litigation until relieved by the court, John Drewen served as arbitrator for Rona Laboratories, Inc., a corporation of the State of New Jersey, in which ownership of the stock was a focal issue of the litigation.

It is not the intent of this Court to dwell on the civil litigation referred to above. However, suffice to say the suit was marked with such incredible bitterness between the parties that it brought a great strain upon all attorneys involved.

Shortly after the opinion was rendered, Harold Krieger received anonymous correspondence on four occasions containing copies of what appeared to be letters and correspondence between Jerome C. Eisenberg, attorney for defendants, John Drewen and Mortimer C. Low. These are marked in evidence as Exhibits C-1, C-2, C-3, C-4. With the exception of the letter dated May 20, 1965 contained in Exhibit C-4 in evidence, the letters received by Mr. Krieger appear to be innocuous in nature and of no significance. Upon receipt of these letters Mr. Krieger called them to the attention of Judge Matthews. On July 2, 1965 Mr. Krieger, his partner, Nicholas Politan, and Jerome C. Eisenberg conferred with Judge Matthews relative to these anonymous letters. The last anonymous letter (Ex. C-4) contained a total of eight copies of letters including the letter of May 20, 1965, the apparently forged letter. The letter dated May 20, 1965 was exhibited to Mr. Eisenberg and upon reading it, he denounced it as a forgery. In the presence of counsel Judge Robert A. Matthews called Chief Justice Weintraub and thereafter the Attorney General was requested to make a complete investigation.

Mr. Richard DeVona, Technical Manager of the Zerox Company, expressed the opinion that the letter dated June 17, 1963 (Ex. C-2) in evidence, was a Zerox copy made on the Zerox copying machine in the office of Harold Krieger.

Trooper Raymond John Vandenbergh of the New Jersey State Police testified it was his opinion that the envelope postmarked June 24, 1965 (Ex. C-1) in evidence and mailed to Harold Krieger from Newark, New Jersey, was typed on an IBM typewriter (Ex C-9) found in Mr. Krieger's office.

During the investigation Harold Krieger was advised by Detective Clinton L. Pagano of the findings as to the Zerox copying machine and typewriter and at that time Mr. Krieger expressed surprise and demanded he be subjected to a polygraph test.

> The results of polygraph tests, whether favorable or unfavorable to an accused, are uniformly held inadmissible. We are aware of no jurisdiction which holds to the contrary, and none has been cited by the State. Basically, the reason for rejection is that the lie detector has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception. State v. Walker, 37 N.J. 208, 214, 216 (1962); State v. Arnwine, 67 N.J. Super. 483 (App. Div. 1961); State v. Varos, 69 N.M. 19, 363 P. 2d 629 (Sup. Ct. 1961); State v. Trimble, 68 N.M. 406, 362 P. 2d 788 (1961); Mattox v. State, 240 Miss. 544, 128 So. 2d 368 (Sup. Ct. 1961); State v. Foye, 254 N.C. 704, 120 S.E. 2d 169 (Sup. Ct. 1961); People v. Aragon, 154 Cal. App. 2d 646, 316 P. 2d 370 (S. Ct. App. 1957); People v. Wochnick, 98 Cal. App. 2d 124, 219 P. 2d 70 (D. Ct. App. 1950); Annot. 23 A.L.R. 2d 1306; 1960 A.L.R. 2d Suppl. Service 1998; 1962 A.L.R. 2d Suppl. Service 580; compare State v. Levitt, 36 N.J. 266, 275 (1961).
>
> *State* v. *Driver*, 38 *N.J.* 255 at 261 (1962).

In *State* v. *Walker*, 37 *N.J.* 208 (1962), at 217, our Supreme Court stated:

> We do not now express any opinion as to whether the results of a lie-detector test should, under all circumstances, be excluded in criminal cases. It is

enough for us to say that in the circumstances of the present case the trial court did not err in its ruling.

Under the circumstances present here, this Court permitted to be offered in evidence on behalf of Harold Krieger the result of the polygraph test made at his request.

The report of the polygraph test dated November 17, 1965 is as follows:

> "After careful analysis of the subject's physiological reactions, it is the opinion of the examiner that the subject did not have anything to do with the theft of the files from Judge Drewen's office and there were no reactions which would have been indicative of his planning or conspiring with anyone else to consummate this theft, nor did he know by whom the crime was committed. The same is true of the anonymous letters." T-178

At the hearing before this Court Harold Krieger, Morris Brauer and all the parties involved in the civil litigation denied any knowledge of the theft of the file from the office of John Drewen and subsequent preparation and mailing of the anonymous letters.

This Court finds from the evidence adduced that Harold Krieger was innocent of any complicity in the theft of the file or the preparation and mailing of the anonymous letters.

As to Morris Brauer, the evidence discloses that he had free access to the suite of offices of Harold Krieger and on several occasions was in the office of John Drewen protesting his rulings as arbitrator.

Regina Pratkl, a receptionist in the office of Harold Krieger, testified that around June 1965 she observed Morris Brauer using the Zerox copying machine in the office of Harold Krieger.

From these facts the Court can properly infer that Morris Brauer was familiar with the physical set-up of the offices of John Drewen and Harold Krieger and had access to the facilities in the office of Harold Krieger. However, mere suspicion cannot be the basis for a finding of guilt on the part of Morris Brauer. There is no evidence to establish to the satisfaction of this Court that Morris Brauer prepared Zerox copies of the anonymous letters including the alleged forged letter, or that he mailed the anonymous letters to Harold Krieger.

This Court therefore finds from the evidence adduced that Morris Brauer was innocent of any complicity in the theft of the file or the preparation and mailing of the anonymous letters.

II

The Forged Letter Matter

Harold Krieger

The sole question remaining is whether Harold Krieger, when he presented the alleged forged letter dated May 20, 1964 (Ex. C-4) to Judge Robert A. Matthews, knew or should have known that the letter was a forgery. From the evidence adduced, this Court cannot say with any degree of conclusiveness that Harold Krieger prepared the forged letter or knew or should have known that the letter was a forgery when he presented it to Judge Robert A. Matthews.

Harold Krieger testified before this Court that when he produced the letter dated May 20, 1965 at the conference before Judge Robert A. Matthews, he stated: "I don't believe Mr. Eisenberg sent this letter. Very frankly I'm surprised. I can't understand it. It's shocking. And something ought to be done." (T-433)

As to the forged letter dated May 20, 1965, Jerome C. Eisenberg testified that the letter was not written by him and that it was a forgery. He went on to explain that the letterhead had been discontinued by his firm a year prior to May 1965; the letter was not his style of writing; he had no prior knowledge of Judge Matthews' decision or what the decision was going to be or when it would come out, and that when he learned of this letter he hired a treasury expert who gave him a report which stated that the signature was obviously a tracing of his signature. (T-23-26)

The testimony of Jerome C. Eisenberg establishes to the satisfaction of this Court that the letter dated May 20, 1965 is a forgery.

This Court in deciding the issue of whether the letter is a forgery, must consider the character and integrity of Jerome C. Eisenberg, John Drewen and Judge Robert A. Matthews and therefore concludes from the evidence adduced that the letter dated May 20, 1965 (Ex. C-4) is a crude forgery and this Court further finds that the letter in question was the product of superimposition. This Court questions the motives of Harold Krieger, an experienced trial lawyer for many years, in presenting the forged letter to Judge Robert A. Matthews and is mindful of the testimony that the Zerox copying machine and a typewriter

in the office of Harold Krieger was used in the preparation of one of the anonymous letters and one of the envelopes received by Harold Krieger, however, there is not sufficient evidence before this Court to support the conclusion that Harold Krieger prepared or aided in the preparation of the forged letter or that he knew or should have known that it was a forged letter at the time he presented it to Judge Robert A. Matthews.

This Court finds there is not sufficient evidence to find Harold Krieger guilty of unethical or unprofessional conduct on the allegation relating to the forged letter.

It is therefore recommended that no further proceedings be instituted against Harold Krieger and Morris Brauer in connection (A) with the alleged theft of a file from the office of John Drewen, and (B) with the alleged preparation and submission to Superior Court Judge Robert A. Matthews of an apparently forged paper.

III

Mortimer C. Low Matter

Harold Krieger

As to the second allegation whether Harold Krieger is guilty of unethical and unprofessional conduct in connection with the making of a criminal complaint against one Mortimer C. Low, the testimony and exhibits disclose the following:

Gershon J. Shugar and David Perlstein in 1947 formed Rona Laboratories, Inc., a New York corporation. In 1949 Rona Laboratories, Inc., a New Jersey corporation, was

formed by Gershon J. Shugar and David Perlstein and each received twenty shares of stock. In 1950 Rona Corporation, a New Jersey corporation, was formed by David Perlstein, Wilbur Perlstein and Gershon J. Shugar and each received equal shares of stock. This corporation became dormant and was reactivated in 1956. In 1955 David Perlstein, Wilbur Perlstein and Gershon J. Shugar formed Rona Sea Products Corporation, a Maine corporation, and continued to do business until 1958 at which time it was liquidated. In 1959 Rona Pearl Corporation, a New Jersey corporation, was formed and became active on September 1, 1959 and in 1962 Rona Sea Products, a New Jersey corporation, was formed, and in each of these corporations Wilbur Perlstein, David Perlstein and Gershon J. Shugar were equal stockholders.

Mortimer C. Low, a certified public accountant of the State of New York maintained the books of Rona Laboratories, Inc.

In the civil action entitled Shugar v. Perlstein, et al, in the Superior Court of New Jersey, Chancery Division, tried before Robert A. Matthews, J.S.C., Mortimer C. Low was called as a witness on behalf of the defendant, Wilbur Perlstein.

On May 14, 1964 depositions were taken of Mortimer C. Low and on September 21, 1964 before Judge Robert A. Matthews, while on cross-examination, Mortimer C. Low stated that he had testified falsely in depositions.

On September 23, 1964 Harold Krieger, after a discussion with Judge Robert A. Matthews, forwarded to James A. Tumulty, Jr., Prosecutor of Hudson County, a letter ad-

vising him that Mortimer C. Low had admitted during the trial that his testimony given at depositions was false. Upon receipt of this letter and enclosures, and after a discussion with Judge Robert A. Matthews, the prosecutor assigned the matter to Joseph P. Hanrahan, First Assistant Prosecutor.

On October 5, 1964 the matter was presented to the Grand Jury and a bill was voted and on November 9, 1964 the indictment charging Mortimer C. Low with false swearing was presented to the Assignment Judge of the Superior Court. At the time of the presentation of this matter to the Grand Jury, there was pending in the Hudson County Prosecutor's office approximately 447 cases awaiting trial, and 412 cases awaiting Grand Jury action.

On December 4, 1964 the defendant, Mortimer C. Low entered a plea of not guilty to the indictment and on December 14, 1964 the indictment was set down for trial for January 11, 1965. On December 16, 1964 a notice of motion to dismiss the indictment was filed with the court by counsel for the defendant, Mortimer C. Low. The motion was adjourned from time to time and on July 2, 1965 the court ordered the indictment dismissed and on July 5, 1965 a formal order dismissing the indictment was entered by the court.

In 1959 during an examination of the books of Rona Laboratories Inc. by the Internal Revenue Service, an affidavit of David Perlstein was submitted to the Internal Revenue Service (Ex. RK-6) setting forth the reasons for the reactivation of Rona Corporation. Thereafter a statement was submitted by Mortimer C. Low to the Internal

Revenue Service (Ex. RK-7) setting forth several reasons for the formation of Rona Pearl Corporation, one of the reasons being that no stock of Rona Laboratories, Inc. could be issued to Wilbur Perlstein and that one of the stockholders (Gershon J. Shugar) refused to sell his stock or have any new stock of Rona Laboratories, Inc. issued to Wilbur Perlstein. The affidvait and statement were submitted to the Internal Revenue Service for tax purposes during an examination.

For a better understanding of the issue, the pertinent testimony of Mortimer C. Low given by him at depositions and at the trial of the civil action entitled Shugar v. Perlstein, et al, is as follows:

Depositions—May 14, 1964

Q. Now Mr. Low, referring to P-55, I assume that this was given to the Internal Revenue for the purpose of showing the existence of Rona Pearl Corporation; is that correct?

A. For the purpose of showing its existence?

Q. The formulation of Rona Pearl; is that right?

A. Yes.

* * *

Q. In this exhibit Internal Revenue was informed that one of the stockholders refused to sell his own stock or have new stock issued. Who did you refer to? Who was the stockholder referred to herein?

Q. Who was the stockholder?

A. Gershon Shugar.

* * *

Q. What corporation were you referring to that he refused to sell any stock in?

A. Rona Laboratories.

Q. And he also refused to have any new stock issued out of Rona Laboratories to Wilbur Perlstein; isn't that so?

A. That is true.

* * *

Q. Someone also told you that they couldn't effect an agreement; isn't that so?

A. That is true.

Q. So that the only alternative was to form Rona Pearl Corporation; is that correct?

* * *

A. Rona Pearl Corporation was formed for several reasons. That was one of them.

Q. I am referring to the statement set forth herein. "So only alternative was to form Rona Pearl." Is that so?

A. That is what the statement says.

Q. That is a fact?

A. As far as this document is concerned, it is.

Q. Now, Rona Pearl was only a sales corporation; isn't that so?

A. That is true.

Q. Now Mr. Low, are you aware of the affidavit submitted to the Internal Revenue in 1959, signed by David Perlstein?

* * *

Q. I don't recollect that. I would have to read it to see.

* * *

Q. In 1959 you were going through a tax examination by the Internal Revenue; is that correct, as Rona Laboratories, as Rona Corporation; is that right?

A. I would have to check the records.

Q. I show you this affidavit and ask you whether or not you are familiar with it. Do you know now whether or not you are familiar with it, Mr. Low?

A. I believe I must have read it, yes.

Q. In fact, you were dealing with the agent at the time, negotiating, were you not, and discussing the examination being made by him; isn't that so?

A. That is true.

Q. To clear up the matters that were raised you submitted an affidavit to the agent; is that correct, or Perlstein's affidavit?

A. It was submitted to me.

* * *

Trial—September 21, 1964

* * *

Q. Now, Mr. Low, can you tell us whether or not one of the reasons for the formation of Rona Pearl was because of the refusal of Gershon Shugar to have stock sold or issued to Wilbur Perlstein?

A. That was not the reason.

Q. That was not what I asked you. I asked you whether that was one of the reasons.

A. That was not one of the reasons.

Q. Not one of the reasons. Mr. Low, as I understand from your testimony now that that was not one of the reasons. Now, let me read to you and tell us which is correct, your answer given now or the answer given in depositions on page 1281.

Mr. Eisenberg: What date?

Mr. Krieger: On May 14, 1964.

* * *

Q. Someone also told you that they couldn't effect an agreement; isn't that so?

A. That's true.

Q. So that the only alternative was to form Rona Pearl Corporation, is that correct; is that right?

A. Rona Pearl Corporation was formed for several reasons. That was one of them.

Q. Do you recall giving that answer?

A. Yes.

Q. Now, is that true?

A. No.

Q. So that your testimony in depositions was not true, is that correct?

A. That's true. I testified in depositions for a reason. I was a little concerned that inasmuch as this affidavit which had been submitted to the Internal Revenue was brought into the picture, I was a little concerned that perhaps I might get into trouble with the Internal Revenue, so I admitted that that was one of the reasons, because we had prepared a statement for the Internal Revenue with that as the reason, but the truth of it was that that was not the reason.

Q. Your testimony is that you testified falsely in depositions?

A. That's true.

Q. And who told you to testify that way?

A. Nobody told me. I testified myself that way. I was a little concerned about the repercussions so far as the Internal Revenue Service was concerned.

Q. That gave you reasons to testify falsely in depositions?

A. That's right.

Q. When did you decide you no longer had to testify falsely to protect your interests?

A. I decided that I would tell the truth. You asked me the questions, I am answering it.

* * *

It appears to this Court after a reading and study of the transcripts marked C-14 and C-15 in evidence, that the inconsistency involved is that at the depositions on May 14,

1964 (Ex. C-14), Mortimer C. Low testified that one of the reasons for the formation of Rona Pearl Corporation was that Wilbur Perlstein was unable to receive shares of stock in Rona Laboratories, Inc. and that Gershon J. Shugar refused to sell or have issued to Wilbur Perlstein stock in Rona Laboratories, Inc., while at the trial on September 21, 1964, Mortimer C. Low denied Rona Pearl Corporation was formed for the reason that Gershon J. Shugar refused to have stock of Rona Laboratories, Inc. sold or issued to Wilbur Perlstein. Mortimer C. Low also testified at the trial of the civil action that it was factually true that Wilbur Perlstein held no stock in Rona Laboratories, Inc. and that Gershon J. Shugar refused to sell or have issued to Wilbur Perlstein stock of Rona Laboratories, Inc. but Gershon J. Shugar and David Perlstein considered Wilbur Perlstein as having a *de facto* one-third interest in Rona Laboratories, Inc., was treated as such and shared in the profits on a one-third basis.

Mortimer C. Low testified before this Court that when he stated at the trial that his testimony was false, he was referring to the statement he made to the Internal Revenue Service. The purpose of the statement to the Internal Revenue Service was to justify the existence of Rona Pearl Corporation and that its formation was for tax write-off purposes. He explained "I feel the statement I made at the trial was a mistaken statement. In other words, when I said that I had committed a falsehood, I don't remember the exact terminology, I believe that I was mistaken because at the depositions I was referring to what was said on the statement that was given to the Internal Revenue." (T-210)

Jerome C. Eisenberg at the hearing before this Court testified that Rona Laboratories, Inc. was involved with an unreasonable accumulation of surplus which amounted to more than $100,000 and that Wilbur Perlstein, David Perlstein and Gershon J. Shugar were stockholders in all corporations but the Rona Laboratories, Inc., and the purpose of the counterclaim filed in behalf of Wilbur Perlstein in the action of Shugar v. Perlstein et al was to establish that Wilbur Perlstein was a stockholder *de facto* in Rona Laboratories, Inc. and should be a stockholder *de jure*. In explaining to the Internal Revenue Service why another corporation was formed, David Perlstein and Mortimer C. Low filed with that agency an affidavit and statement showing that Wilbur Perlstein was not a stockholder *de jure* in Rona Laboratories to emphasize the reason for the forming of the other corporation, Rona Pearl Corporation.

Harold Krieger testified that the corporations other than Rona Laboratories, Inc. were formed for tax purposes. He explained that the affidavit and statement were submitted to the Internal Revenue Service to show that these other corporations were formed for the purpose of giving Wilbur Perlstein stock in said corporations because he could not buy stock in Rona Laboratories, Inc. and that Gershon J. Shugar and David Perlstein would not sell stock or issue to him stock in Rona Laboratories, Inc.

The gravamen of the issue here is whether the admission by Mortimer C. Low at the trial on September 21, 1964 that he testified falsely at the time he was deposed on May 14, 1964 was sufficient cause to warrant Harold Krieger to institute a criminal proceeding against Mortimer C. Low,

or did Harold Krieger initiate the criminal proceedings in order to obtain an advantage in the civil proceeding.

It is not clear to this Court from the order of the Supreme Court whether a finding should be made as to the claim by Harold Krieger that Mortimer C. Low testified falsely at the depositions. However, under the circumstances here and in order to make a proper finding of fact as to the conduct of Harold Krieger, this Court finds it necessary to make such a finding.

The mere statement by a witness that he has testified falsely, standing alone, is not sufficient to establish false swearing and will not justify the institution of a criminal proceeding for false swearing.

The testimony of Mortimer C. Low was damaging to the plaintiff's case and favorable to the counterclaim demand that Wilbur Perlstein be adjudicated to have a one-third interest in Rona Laboratories, Inc.

As to Mr. Low's testimony, Judge Robert A. Matthews stated in his opinion as follows:

> "... My evaluation of Mr. Low's role, both before and after the estrangement of the parties, is that of attempted arbiter. Clearly, his efforts were bent upon solving the disagreements which arose among the three principals to the end that they would not destroy the lucrative enterprise which they had created. At one juncture in the trial, when confronted with a deposition statement, Mr. Low indicated on the record that he had testified falsely to the event then under consideration at depositions. The fact under investigation at the time involved the

preparation of an affidavit to be filed with the Internal Revenue Service for the purpose of justifying the separate existence of one of the Rona corporations. One of the reasons given for the creation of the corporation in question was the lack of stock ownership in Laboratories by Wilbur. Clearly, the point being pressed at the time was immaterial to the ultimate issue to be decided among the parties. Unquestionably, in the circumstances of the situation then existing among David, Wilbur and Gershon, Wilbur was not a stockholder in Laboratories. . . ." (Ex. RK-9)

This Court finds from the testimony and the exhibits offered at the hearing that Mortimer C. Low did not willfully swear falsely and did not intentionally and knowingly give false testimony at the depositions. This Court further finds from the colloquy between Judge Robert A. Matthews and Harold Krieger at the time Mr. Low self-characterized himself as being untruthful that Judge Matthews considered the matter as trivial, recognizing that what was really involved was a lack of candor on the part of Mortimer C. Low when dealing with the Internal Revenue Service in connection with the reasons for creating Rona Pearl Corporation.

The testimony of Harold Krieger reveals that on September 22, 1964 he had a conference with his partners, Benjamin Chodash and Nicholas Politan relative to his belief that Mortimer C. Low had testified falsely. They discussed the admission by Mr. Low and concluded that *Canon* 29 of *Professional Ethics* compelled Harold Krieger to first consult with Judge Matthews and then refer the

matter to the prosecutor of Hudson County. It is significant to note that Harold Krieger offered no testimony to indicate that he had reviewed the False Swearing Statute and the cases related thereto, to determine whether Mortimer C. Low actually swore falsely as contemplated by the Statute. Harold Krieger proceeded to the chambers of Judge Robert A. Matthews and advised the judge of his intention to refer the matter to the prosecutor. In response, Judge Matthews attempted to dissuade Mr. Krieger from referring the matter to the prosecutor and advised Mr. Krieger to do what he wanted and not to do something for which he would be sorry.

Despite the attempt by Judge Matthews to dissuade Mr. Krieger from taking the matter to the prosecutor, he returned to his office and dictated the letter of September 23, 1964 which was delivered to James A. Tumulty, Jr., Prosecutor of Hudson County.

The evidence before this Court discloses that the letter dated September 23, 1964 with the enclosure addressed to James A. Tumulty, Jr., Prosecutor of Hudson County, bore no postage, no postmark and was probably hand delivered. Upon receipt of the letter by the prosecutor, the matter was turned over to Assistant Prosecutor Joseph P. Hanrahan. The testimony of Prosecutor James A. Tumulty, Jr. at the hearing revealed that he could not explain to the satisfaction of this Court the reason for the legend "Special—False Swearing" appearing on the envelope (Ex. C-21).

In evaluating the testimony of James A. Tumulty, Jr., this Court finds that he was evasive and uncooperative and was of no assistance to the court in ascertaining what had

transpired between himself and Harold Krieger relating to the matter of Mortimer C. Low.

Joseph P. Hanrahan, Assistant Prosecutor, testified it was his recollection that the Low matter was assigned to him by the prosecutor and he was instructed to get the matter before the Grand Jury. On October 5, 1964, ten days after receipt of the letter and transcripts, the matter was presented to the Grand Jury and a bill was voted. On November 9, 1964 an indictment was presented to the court charging Mortimer C. Low with false swearing in violation of *N.J.S.A.* 2A:131-4 and 2A:131-5.

It is interesting to note that at the time the Low matter was presented by the prosecutor to the Grand Jury on October 5, 1964, there were pending in the Hudson County Prosecutor's Office approximately 447 cases awaiting trial and 412 cases awaiting Grand Jury action.

Harold Krieger at the hearing before this Court testified he did not have anything to do with the timing of the presentation of the Low matter to the Grand Jury, and did not confer with the prosecutor prior to the transmittal of his letter dated September 23, 1964. James A. Tumulty, Jr. testified he had no recollection of any conversation with Mr. Krieger prior to the receipt of the letter dated September 23, 1964. It is evident to the Court from the swift chronology of events that there must have been a discussion between them and that there was a request by Harold Krieger to the prosecutor for a speedy presentation of the matter to the Grand Jury. To conclude otherwise would be an absurdity.

The circumstances surrounding the presentation of the matter to the Grand Jury by the prosecutor leads this Court to the conclusion that Harold Krieger assisted, co-operated and participated in the criminal proceedings which resulted in an indictment being returned against Mortimer C. Low in order to obtain an advantage in the pending civil action.

In assessing the motives of Harold Krieger in initiating a criminal proceeding against Mortimer C. Low, this Court must consider his actions and the natural consequences which flow from them. His actions were his own and not urged or initiated in any way by his client. It is apparent to the Court that the bitterness among the parties to the civil action spilled over on to the attorneys.

The testimony of Mortimer C. Low devastated the plaintiff's contention that Wilbur Perlstein had no interest in Rona Laboratories, Inc. and consequently it was imperative to discredit Mortimer C. Low, if possible.

It is to be noted further that Mortimer C. Low was indicted for false swearing sometime prior to the decision rendered by Judge Matthews in the civil action. The transmitting of the letter of September 23, 1964 by Mr. Krieger to the prosecutor and the speedy return of an indictment against Mortimer C. Low was designed to place Judge Matthews in a position of relying upon the testimony of a witness who was indicted for false swearing.

Harold Krieger contends he relied on *Canon* 29 of *Canons of Professional Ethics* when he transmitted the letter of September 23, 1964 to the prosecutor. *Canon* 29 provides as follows:

> "* * * The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and the public to bring the matter to the knowledge of the prosecuting authorities. * * *"

This Court finds that the contention of Harold Krieger is without merit and that *Canon* 29 of *Canons of Professional Ethics* is inapplicable under the facts presented here.

In the present situation when Mr. Low stated in open court that he had testified falsely, there was a full and complete discussion between Judge Matthews and Harold Krieger and at that time Judge Matthews advised Mr. Krieger that he considered the matter trivial. Despite this statement by the court, Mr. Krieger proceeded to initiate criminal proceedings against Mortimer C. Low by transmitting to the prosecutor the letter dated September 23, 1964.

The record before this Court discloses that a criminal complaint, as such, was not filed by Harold Krieger against Mortimer C. Low. However the Court finds that by the transmittal of the letter dated September 23, 1964, Harold Krieger assisted, cooperated and participated in the criminal proceedings which resulted in an indictment being returned against Mortimer C. Low charging him with false swearing. This action shows an absence of high ideals on the part of an experienced trial lawyer. See *In re Cohen,* 46 *N.J.* 202 (1966). The evidence before this Court as to the unethical and unprofessional conduct of Harold Krieger is clear and convincing. See *In re Pennica,* 36 *N.J.* 401, 419 (1962).

The Court concludes from all the evidence that Harold Krieger assisted, cooperated and participated in a criminal proceeding against Mortimer C. Low in order to obtain an advantage in the court action entitled Shugar v. Perlstein, et al which was still pending and awaiting the decision of Judge Robert A. Matthews. This conduct on the part of Harold Krieger is in violation of *Canons* 15 and 18 of *Canons of Professional Ethics.*

For the reasons stated the Court finds Harold Krieger guilty of unethical and unprofessional conduct in violation of *Canons* 15 and 18 of *Canons of Professional Ethics.*

IV

Harold Teltser Matter

Morris Brauer

As to the allegation whether Morris Brauer is guilty of unethical and unprofessional conduct in seeking to induce another member of the Bar, Harold Teltser, to transmit a corrupt proposal to Brendan T. Byrne, the Prosecutor for Essex County, the testimony before this Court discloses the following:

In October 1965, Harold Teltser, an Attorney-at-Law of New Jersey, a law partner of Brendan T. Byrne, Esq., the Prosecutor for Essex County, represented one Edward Ravin who was negotiating a loan from Julius Steinberg who was represented by Morris Brauer. During the course of the matter, Morris Brauer, whom Harold Teltser did not know nor had ever seen, expressed the desire on several occasions to meet with Harold Teltser alone. Morris Brauer never indicated why he wished to meet with him

alone, but various appointments were made and cancelled for one reason or another.

On October 19, 1965, Harold Teltser, with his client, Edward Ravin, went to the home of Julius Steinberg. Present there were Mr. & Mrs. Julius Steinberg and Morris Brauer. After introductions, Mrs. Julius Steinberg went to another room. The two attorneys, Harold Teltser and Morris Brauer, and their respective clients, sat at the dining room table and proceeded to close the loan transaction.

In the midst of the discussion, Morris Brauer asked Harold Teltser if he could speak to him alone. They walked into the den situated immediately behind the dining room, and Morris Brauer closed the door. To this point the facts are not in dispute. What was subsequently said by Harold Teltser and Morris Brauer is in dispute.

The testimony of Harold Teltser is that Morris Brauer asked him if he knew Brendan T. Byrne, and "Do you talk to him?" Morris Brauer then said "What's he looking for? Doesn't he like money?" He testified further that Morris Brauer went on to state that he (Morris Brauer), knew or had people who were interested in running a very high class craps game in Essex County and that they had a lot of money and the whole thing was worked out, and that the municipality and the Attorney General were taken care of, and the only one they did not have and needed was Brendan T. Byrne. Morris Brauer further stated that these people were willing to pay a lot of money. Thereafter some conversation followed in which Harold Teltser defended Mr. Byrne's integrity and at the end of the con-

versation Morris Brauer asked Harold Teltser if he would talk to Brendan T. Byrne.

The following day Harold Teltser related the episode to Brendan T. Byrne who in turn notified the office of the Attorney General.

Morris Brauer corroborated the testimony of Harold Teltser up to the meeting at the Steinberg residence. His version of the events is that at a point during the closing of the loan transaction, Julius Steinberg and Edward Ravin began to discuss interest that exceeded the legal maximum and Morris Brauer felt that he and Harold Teltser should not be present during such discussions. He then asked Mr. Teltser to accompany him to the den. In the den, Morris Brauer testified that he mentioned the name of Madeline Christianson whom Teltser, Byrne & Greenberg, Esqs. had represented in some litigation. He stated further that he told Harold Teltser that she was unhappy with the way Mr. Teltser's firm represented her and they had done nothing for her. Morris Brauer also stated he told Harold Teltser that Mrs. Christianson felt there was something "fishy or unethical" about their handling of the matter. Morris Brauer claims that when he finished his conversation, Harold Teltser said "no one can point a finger of suspicion at Mr. Byrne, the Prosecutor." Morris Brauer stated further that Harold Teltser went on to point out that Brendan T. Byrne was offered judgeships and better jobs to relinquish the office of Prosecutor for Essex County, and that he was offered money by gamblers and politicians to allow a plush game to operate in Essex County, which he refused. Morris Brauer claims the conversation ended on that note.

In this matter this Court is confronted with the question of the credibility to be afforded the witnesses, Harold Teltser and Morris Brauer. In determining the question of the credibility of the witnesses or the credit to be given to the testimony of the witnesses, this Court must consider the manner in which they testified, their attitude and demeanor while testifying, their interest in the matter and investigation, and the inherent probability or improbability of their testimony tested by common sense and human experience.

The evidence before this Court comes from the mouth of Harold Teltser. Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. *Spagnuolo* v. *Bonnet,* 16 *N.J.* 546, 554 (1954).

In weighing the testimony of Morris Brauer, this Court finds it difficult to believe his version of the events which took place in the den on the evening of October 19, 1964. The Court was not impressed with the witness, Morris Brauer. His testimony lacked candor and was wholly improbable and unbelievable.

Harold Teltser is a highly regarded and well respected member of the Bar since 1952. His attitude and demeanor as a witness strikes this Court as being one of complete candor and fairness, and his testimony is credible beyond question. It is apparent to this Court that while he disliked his role, he knew his obligations as an attorney. His account of the conversation in the den was lucid, coherent and truthful. He was not confused as contended by Morris Brauer. This Court further concludes from the evidence

that Harold Teltser believed Morris Brauer's proposal to be serious and not in jest.

On the other hand, this Court finds that Morris Brauer's version of the conversation in the light of human experience did not have the same qualities. It would be incredible that an attorney upon meeting a brother attorney for the first time would indirectly accuse his firm of "fishy or unethical dealings."'

Morris Brauer's testimony of Harold Teltser's impassioned defense of Brendan T. Byrne's integrity borders on *a non sequitur.* Harold Teltser's account that Mrs. Christianson was casually mentioned in the beginning of the evening makes much better sense.

To believe the testimony of Morris Brauer would be in effect saying that Harold Teltser deliberately lied, or was mentally unbalanced, or of such vicious bent as to deliberately destroy a fellow attorney. In view of the testimony before this Court, none of these possibilities exist.

This Court is satisfied that Morris Brauer attempted to induce Harold Teltser, a member of the Bar, to transmit a corrupt proposal to Brendan T. Tyrne, Prosecutor for Essex County.

The evidence before this Court is clear and convincing that Morris Brauer is guilty of unethical and unprofessional conduct in seeking to induce Harold Teltser, a member of the Bar, to transmit a corrupt proposal to Brendan T. Byrne, the Prosecutor for Essex County.

/s/ JAMES R. GIULIANO, *J. S. C.*
JAMES R. GIULIANO
Master of the Supreme Court

APPENDIX C

Order of Suspension

SUPREME COURT OF NEW JERSEY

D-4 SEPTEMBER TERM 1966

In the Matter of

MORRIS BRAUER,

At Attorney at Law.

It is Ordered that MORRIS BRAUER be suspended from the practice of law for three years and until the further order of this Court.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 21st day of November, 1966.

MORTIMER SHERMAN
Acting Clerk

APPENDIX D

Order Denying Rehearing

SUPREME COURT OF NEW JERSEY

D-4 SEPTEMBER TERM 1966

ON PETITION FOR REHEARING

In the Matter of
MORRIS BRAUER,
an attorney-at-law.

No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 28th day of February, 1967.

JOHN H. GILDEA
Clerk

Filed

Feb 28 1967

JOHN H. GILDEA
Clerk

APPENDIX E

Rules of the Supreme Court of New Jersey

1:9-4. Petition for Rehearing

(a) Within 10 days after judgment is entered, unless the time is enlarged by the order of the court, a party may apply for a rehearing by filing 12 copies of a petition with the court, and serving 3 copies on counsel for each of the opposing parties. The petition shall not exceed 20 pages in length. It shall contain a brief statement of the grounds relied upon, relevant argument, and a certificate of counsel that it is submitted in good faith and not for purposes of delay. An answer may be filed with the clerk of the court within 10 days after service of the petition for rehearing, unless the time is shortened or enlarged by the court. Such answer is not required, unless requested by the court.

(b) A rehearing of a cause may be granted in whole or in part, and on terms. Unless otherwise ordered by the court, the petitioning party, on rehearing, shall be regarded as the appellant, and shall file his brief within 30 days of the entry of the order granting the rehearing, and thereafter the same procedures shall be followed as are provided for on original arguments.

(c) A petition for rehearing is not subject to oral argument, and the petition will not be granted, unless a justice who concurred in the judgment or decision moves it, and a majority of the court so determines.

Note: Amended December 7, 1950. Formerly Rule 1:4-8.

Chapter VI. Disciplinary Proceedings

Rule 1:16. Ethics Committees

Note: Caption of Rule 1:16 amended July 15, 1960 to be effective September 7, 1960.

1:16–1. Appointment; Organization

(a) The court shall appoint an ethics committee in each county, consisting of at least 4 counsellors, resident or practicing in said county. The court shall designate the chairman of the committee to serve for a period of one year, and to the extent possible shall rotate the office of chairman among members of the committee. The terms of members shall be staggered, the term of one or more to expire each year. Any vacancy occurring during a term shall be filled by an appointment for the unexpired portion thereof.

(b) Each committee shall organize annually on or before the second Monday in January, and shall meet regularly in each month thereafter, except during July and August, if there are any matters pending which require attention. Each committee shall appoint a secretary, who need not be a member of the committee, but who shall be a member of the bar.

(c) A majority of the full membership of the committee shall constitute a quorum. A determination shall be made by a majority of the membership sitting. When, by reason of absence, disability, or disqualification the number of members able to act is less than a majority, the chairman shall apply to the court for the appointment of a temporary member or members. Where a quorum of the committee consists of more than 3, the chairman of the committee may

assign an ethics matter to a panel of 3 which panel shall act as the committee for the disposition of the matter and report to the court.

Note: Effective September 9, 1953; paragraph (a) amended July 15, 1960 to be effective September 7, 1960; paragraph (c) amended December 6, 1962 to be effective January 2, 1963. Formerly Rules 1:9–1(a) and (b); 1:9–2(a) amended November 10, 1949; 1:9–3 amended November 10, 1949; 1:9–4(h) amended November 10, 1949, December 7, 1950.

1:16–2. Jurisdiction

(a) Each committee shall have jurisdiction over, and shall inquire into and consider, any complaint made against any attorney practicing within its county, involving his character, integrity, professional standing or conduct as a member of the bar. In case of any conflict over jurisdiction, the court, after informal presentation of the matter on motion, shall resolve the conflict and refer the complaint to the proper committee.

(b) A committee may, on its own motion and without formal complaint being made to it, investigate any condition or situation in the county coming to its attention and involving the character, integrity, professional standing or conduct of any attorney practicing in the county. If the committee finds evidence of unprofessional or unethical conduct it shall have prepared a statement of charges which shall be regarded as a complaint and proceedings shall be thereafter had as under Rule 1:16–4.

(c) Where necessary, a committee may apply to the court for an order directing the county prosecutor to aid in any such investigation.

(d) A committee shall not render advisory opinions.

Note: Amended November 10, 1949. Formerly Rule 1:9–2.

1:16–3. Secretary; Confidential Records; Reports

(a) The secretary shall keep complete minutes of all meetings and proceedings of the committee. He shall be responsible for the preservation of all its records and files, and shall surrender them complete and intact, to his successor in office.

(b) All records, files, meetings and proceedings in all disciplinary matters shall be regarded as confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or by this court.

(c) The secretary shall submit a report on the first day of each month to the Administrative Director of the Courts, for the information of the court, showing the status of all matters pending before the committee. He shall also report on any investigation initiated by the committee, the status thereof, and the committee's findings.

Note: Effective September 9, 1953; paragraph (b) amended December 9, 1963 to be effective January 2, 1964. Paragraphs (a) and (b) formerly Rule 1:9–1(c), amended November 10, 1949; paragraph (c) formerly Rule 1:9–3, amended November 10, 1949.

1:16–4. Form of Complaints; Procedure

The following procedure shall govern the handling of complaints:

(a) Every complaint shall be in writing, signed and sworn to, and filed with the secretary of the committee in triplicate. It shall state the names and addresses of the complainant and the attorney complained against, the facts constituting the alleged improper conduct on the part of the attorney, and whether the same or a similar complaint

has ever been made to and considered by any ethics committee. The secretary shall, where necessary, assist the complainant in preparing the complaint.

(b) Immediately upon receipt of a complaint, the secretary shall make written acknowledgment thereof to the complainant. He shall forthwith serve a copy on the attorney named therein, either personally or by regular mail, and mail a copy to the Administrative Director of the Courts. The secretary shall open a separate file for each complaint and properly index it.

(c) The attorney shall, within 10 days after the mailing of the complaint to him, file a written answer thereto, in triplicate, with the secretary of the committee. The secretary shall mail one copy to the complainant and one copy to the Administrative Director of the Courts. He shall also, upon receipt of the answer, or at the expiration of the 10-day period if there be no answer, refer the complaint to one or more members of the committee designated by the chairman for preliminary investigation. Such investigation shall be promptly instituted and completed. The committee member or members shall interview the complainant and the attorney involved, and shall conduct the investigation in such other manner as may be deemed proper. Upon its conclusion, a written report of the investigation and of the findings shall be made to the entire committee, and a copy thereof forwarded forthwith to the Administrative Director of the Courts. If the attorney shall fail to file an answer as herein prescribed or shall fail to appear at the time fixed for hearing, the committee shall notify the court of such fact by letter. Upon receipt of said letter the court

may, if the circumstances warrant, immediately issue an order directing the attorney to show cause why he should not be suspended pending disposition of the complaint.

(d) The committee shall consider the investigation report at the first regular meeting following its filing. If, after consideration, the committee finds that there has been no unethical or unprofessional conduct, and votes to dismiss the complaint, it shall submit a full report of the facts and of its conclusions to the court through the Administrative Director of the Courts. The secretary shall at the same time notify the complainant and the attorney involved of the dismissal and the reasons therefor, in writing, and mark the file "Closed".

(e) If the committee, after considering the report of the preliminary investigation, determines that there are indications of unethical or unprofessional conduct meriting further investigation, the complaint shall be set down promptly for formal hearing. The secretary shall give at least 10 days' written notice to the attorney involved, and to the complainant, by regular mail, stating:

(1) The time and place of formal hearing.

(2) That he may be represented by counsel, if he desires.

(3) That subpoenas will be furnished to him if he will send the names and addresses of his proposed witnesses to the secretary.

(4) That he may produce witnesses and such proof before the committee as may be relevant to the issue.

(f) If the complainant is not represented by counsel, the committee shall designate a counsellor to prepare and

prosecute the case before it. If the person so designated be a member of the committee, he shall not thereafter take part in the discussion of, nor vote upon, that particular case.

(g) The hearing shall be conducted in private and in a formal manner. A complete stenographic record shall be kept, and to this end an official court stenographer of the county, assigned by the supervising court reporter for that purpose, shall serve the committee and prepare all necessary transcripts without additional compensation. Such transcripts may be ordered only by the chairman in the event a presentment is voted by the committee or, in the discretion of the chairman, when unusual circumstances warrant; provided, however, that the transcripts may be made available solely to members of the committee. The transcripts of a hearing shall not be made available to any member of the committee who has disqualified himself from participating in such hearing. The chairman, or in his absence or disability another member chosen by the committee, shall preside over and conduct the proceedings. Any member of the committee is hereby authorized to administer oaths to all such witnesses as may appear or be brought before the committee. The complainant and the attorney complained against shall have the right to be present at all times during the hearing, with their respective attorneys, if any. They shall also have the right to examine and cross-examine witnesses, but examination and cross-examination by the complainant shall be conducted principally by his attorney or the prosecutor designated by the committee. The committee shall not be bound by strict rules of evidence.

(h) The committee shall consider the case promptly at the conclusion of the formal hearing and reach a determination. If it decides that there has been no unethical or unprofessional conduct, it shall dismiss the complaint, and the secretary shall at once notify the interested parties of the dismissal and the reasons therefor, in writing and mark the file "Closed". The committee shall also submit a full report of the facts and of its conclusion to the court through the Administrative Director of the Courts. If the committee decides that there has been unethical or unprofessional conduct, the secretary shall promptly prepare an original and 9 copies of a presentment, to be signed by the members of the committee concurring therein. The presentment shall consist of a summary of the case containing the committee's findings of fact. The committee shall likewise cause to be prepared an original and 9 copies of the transcript of the testimony. The original and 7 copies each of the presentment and transcript, together with all exhibits, shall be filed with the court, one copy each of the presentment and transcript shall be served upon the respondent, and one copy of each shall be retained by the committee.

(i) The court shall consider the presentment and determine whether to issue an order to show cause why the respondent should not be disbarred or otherwise disciplined. If no order to show cause is to be issued, the clerk of the court shall so notify the committee and the respondent. If an order to show cause is issued, the same shall be served upon the respondent. The order shall fix a date for hearing before the court, which hearing shall be on the record before the committee. The attorney designated by the committee to prosecute the matter shall prepare a brief in

support of the presentment and file 8 copies thereof with the court and serve a copy thereof on the respondent within 2 weeks of the date of the order to show cause. Within 2 weeks of the date of service of the committee's brief, the respondent shall file with the court 8 copies of his answering brief and serve a copy thereof on the attorney for the committee. Briefs may be typewritten.

Note: Effective September 9, 1953; paragraph (a) amended July 15, 1960 to be effective September 7, 1960; paragraphs (c) and (h) amended December 6, 1962 to be effective January 2, 1963; paragraph (i) adopted July 27, 1961 to be effective September 11, 1961; amended December 6, 1962 to be effective January 2, 1963. Formerly Rule 1:9-4, amended November 10, 1949; December 7, 1950.

1:16-5. Subpoena for Witnesses

(a) The chairman of an ethics committee, the secretary or any member thereof, upon determining that certain persons may have any information or knowledge or be in the possession of any books, papers, documents or other tangible things material to any investigation or hearing authorized by these rules, may issue subpoena in the name of the Clerk of the Superior Court requiring such person or persons to appear and testify before or be examined by the committee, or any member thereof, at the time and place named in the subpoena, and from day to day thereafter until the testimony or examination of such person or persons shall be completed.

(b) The subpoena may also contain a direction that such person bring with him to the examination, any books, papers, documents, or tangible things designated therein.

Note: Effective September 9, 1953; amended July 15, 1960 to be effective September 7, 1960. Formerly Rule 1:9-6, amended November 10, 1949; December 7, 1950.

1:16-6. Service of Subpoena

The process of subpoena authorized by Rule 1:16-5 shall be served in the same manner and be of the same force and effect as like process in civil actions in the Superior Court.

Note: Adopted November 10, 1949. Formerly Rule 1:9-7.

1:16-7. Disobedience to Subpoena

(a) In case any person so summoned by subpoena shall refuse to obey the subpoena, or any direction therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or tangible things as required, the chairman of the committee may apply to the Superior Court on motion supported by affidavits for an order to show cause or an order of arrest against such person as for a contempt.

(b) The court shall hear the application, and if satisfactory proof be made of such refusal, may issue an order, directed to the sheriff or any constable of the county, for the arrest of such person, or may issue an order against such person directing him to show cause why he should not be held in contempt.

(c) If upon hearing, the court determines that the failure or refusal of the person was without justification, the court may punish him as for a contempt of court, and may compel him to pay the costs of the contempt proceeding to be taxed by the court.

Note: Adopted November 10, 1949. Formerly Rule 1:9-8.

Rule 1:17. Review

1:17-1. Petition for Review

Any complainant aggrieved by the determination of a committee may petition the court for relief, and the court shall make such reference or other disposition as it seems proper in the circumstances.

Note: Amended November 10, 1949. Formerly Rule 1:9-4(i).

1:17-2. Order for Review

When ordered by the Court, the Board of Bar Examiners shall review any proceeding heard by an ethics committee, and shall submit a report of its findings to the Court. Such review may be made on the record before the ethics committee, when so ordered by the Court, but in other causes shall be heard de novo. The Chairman of the Board shall have the same power to issue subpoenas as provided in Rule 1:16-5 and they shall be enforced as provided in Rule 1:16-7.

Note: Effective September 9, 1953; amended July 15, 1960 to be effective September 7, 1960. Formerly Rule 1:8-1(e) and (f).

Rule 1:18. Discipline and Disbarment

1:18-1. Filing of Papers

Presentments made to the court for the purpose of obtaining an order to show cause why an attorney should not be disbarred or why he should not be otherwise disciplined shall not be filed without an order of the court; and no such order to show cause, if allowed, shall be actually

entered until the court by special order so directs; and whenever such an order, not entered, shall be discharged, no entry thereof shall be made and no papers shall be filed.

Note: Amended November 10, 1949. Formerly Rule 1:9-5(a)

1:18-2. Suspension and Disbarment

(a) No person who shall be disbarred or suspended as an attorney at law shall, during the period of such disability, practice as a counsellor at law.

(b) No attorney shall employ in his law offices any attorney who was disbarred or suspended after January 1, 1953, during the period of such suspension, nor shall any attorney permit or authorize any such disbarred or suspended attorney to perform any services for him in the practice of law, or to occupy, share or use office space with him in the office where he practices law, during the period of such suspension.

(c) No application for reinstatement by a person who has been suspended as an attorney-at-law shall be heard by the court unless 30 days notice thereof shall be given to the chairman of the ethics committee which conducted the said disciplinary proceedings, and to the chairman of the ethics committee of the county in which said person resides at the time of such application. Each of such chairmen shall bring the application to the attention of his committee which shall review the file and make an investigation of the applicant's activities subsequent to his suspension. Each committee shall submit a written report of its findings to the court.

Note: Effective September 9, 1953; paragraph (c) amended July 15, 1960 to be effective September 7, 1960. Paragraphs (a) and (c) formerly Rule 1:9-5(a) and (c), amended November 10, 1949; paragraph (b) formerly Rule 1:7-7(i), adopted January 1, 1953.

Rule 1:27A. Relaxation of Rules

The rules applicable to any court shall be considered as general rules for the government of the court and the conduct of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any instance where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

Note: Adopted June 28, 1954 to be effective September 8, 1954.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT	4
CONCLUSION	5

Cases Cited

Mattera, In re, 34 N. J. 259 (1961)	5
Wittreich, In re, 5 N. J. 79 (1950)	5

United States Constitution Cited

14th Amendment	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

MORRIS BRAUER,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY,

Respondent.

IN THE MATTER

of

MORRIS BRAUER,
An Attorney At Law.

BRIEF FOR RESPONDENT, SUPREME COURT OF NEW JERSEY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of New Jersey is reported in 48 N. J. 186 (1966) and is printed in the Petitioner's Appendix (hereinafter cited as Pet. App. A-1 to

A-21). The "report and findings of fact" of the master designated by the Supreme Court of New Jersey for hearing in this matter is unreported and is printed in Pet. App. B (A-22 to A-51).*

Jurisdiction

No federal constitutional questions were tendered in this action at any time prior to final judgment. Petitioner sought to raise such questions for the first time after judgment by a petition for rehearing. The Supreme Court of New Jersey denied the petition for rehearing, thus declining to accept the issues offered.

There is no foundation under the practice governing the courts in New Jersey for the distinction which the petitioner seeks to make between a denial of a petition for rehearing and a dismissal of such petition. A petition for rehearing is either granted, whereupon the matters offered are heard, or the petition is denied. Therefore, under the court below's practice, the constitutional arguments were not accepted or passed upon.

Additionally, Petitioner's eleventh hour efforts to project this disciplinary action into a constitutional dimension should be treated as illtimed. Petitioner was represented by eminent counsel (a former Attorney General of the State of New Jersey) at the hearing of the matter before

---

* The Petition for Writ of Certiorari to the Supreme Court of New Jersey was received by the Clerk to that Court on April 21, 1967. The Clerk of the New Jersey Supreme Court, in accepting the Petitions filed with him, did not understand them to be service on the respondent in this cause until counsel for the Petitioner so advised the Clerk on or about May 26, 1967. Immediately thereafter, the Court advised the Attorney General's office of the pendency of the Petition. The New Jersey Supreme Court regrets the delay occasioned by this misunderstanding and extends its apologies therefor.

the Honorable James R. Giuliano at which time he had full and complete opportunity to crossexamine any witnesses confronting him as well as present testimony on his own behalf. Detailed findings of fact and conclusions of law were prepared by Judge Giuliano after the hearing of the matter. Briefs were filed on behalf of the Petitioner and the entire proceeding was reviewed by the Supreme Court of New Jersey.

As the opinion of the New Jersey Supreme Court indicates (Pet. App. A-5 to A-8), counsel for Mr. Krieger, another member of the bar who was also a respondent in the same proceeding, was critical of the nature of the hearing before Judge Giuliano. Although the court below could see no basis for a claim of misunderstanding, it offered Mr. Krieger an opportunity to reopen the hearing if he so desired. Mr. Krieger declined the offer. The petitioner, Mr. Brauer, and his counsel were present throughout the argument and during the colloquy just described, and neither made a like criticism nor did they request a further hearing.

Under these circumstances it is difficult to perceive how the Petitioner can now be permitted to raise constitutional issues for the first time when he has failed to present such issues in timely fashion up and through the oral argument before the Court below.

It is respectfully submitted that the jurisdictional requirements for *certiorari* in this Court are lacking in this case and that the Petition should be dismissed.

Questions Presented

1. Whether a Petition for Certiorari should be granted where constitutional questions are not timely raised in the State Court proceedings.

2. Whether a member of the bar in a disciplinary proceeding where he had a full hearing before a Judge of the Superior Court of New Jersey in a procedure substantially equivalent to that obtaining in a county ethics committee hearing was denied due process and equal protection of the laws in contravention of the 14th Amendment to the United States Constitution.

Constitutional Provisions and Statutes Involved

This case purportedly involves the due process and equal protection provisions of the 14th Amendment to the United States Constitution.

Statement of the Case

In view of the position taken herein; namely, that the federal constitutional issues were not timely raised in the State proceedings, there is no necessity to elaborate on the facts in this matter. They are, however, set forth in the opinion of the Supreme Court of New Jersey which is found in Pet. App. A-16 to A-20.

ARGUMENT

As permitted by the rules of this Court, argument relating to the jurisdiction of this Court is embraced under the jurisdictional point in this brief. Although the Respondent's position is that the jurisdictional basis for this Court to grant *certiorari* is absent in this case, it should not thereby be inferred that the Respondent considers the Petitioner to have been treated less than fairly in this serious matter. Notwithstanding Petitioner's rather speculative assertions in his Petition, it is submitted that the Petitioner herein was afforded a maximum of due process. Moreover, the Petitioner was not treated in a manner different from other

attorneys who have been subjected to the disciplinary procedures of the New Jersey Supreme Court. Disciplinary matters have been referred to a Judge acting as a master, rather than to an Ethics Committee, on other appropriate occasions. See *e.g. In re Mattera*, 34 N. J. 259 (1961); *In re Wittreich*, 5 N. J. 79 (1950) [The record shows that Mr. Justice Brennan, then a Judge of the New Jersey Superior Court, sat as a Master for the Court in the *Wittreich* matter].

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Respondent, Supreme Court of New Jersey.

ALAN B. HANDLER,
First Assistant Attorney General,
Of Counsel.

RICHARD NEWMAN,
Deputy Attorney General,
On the Brief.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 2 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1304

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

In the Matter of Morris Brauer, An Attorney at Law.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF

Abraham Glasser
Attorney for Petitioner Morris Brauer
52 Eighth Avenue
New York, New York 10014

32 Case Press Inc., 421 Hudson St., N.Y.—ORegon 5-4540

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 2 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1304

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

In the Matter of Morris Brauer, An Attorney at Law.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF

Abraham Glasser
Attorney for Petitioner Morris Brauer
52 Eighth Avenue
New York, New York 10014

32 Case Press Inc., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

PAGE

I. Respondent's suggestion that the by-passing of the Hudson County Ethics Committee in this case is supported by relevant precedent 2

II. The question of jurisdiction 11

CONCLUSION 12

AUTHORITIES CITED

Cases

In re Mattera, 34 N.J. 259 (1961) .....3, 4, 5, *passim*

In re Wittreich, 5 N.J. 79 (1950) .....3, 4, 5, *passim*

Miscellaneous

Soney & Sage, Publishers, New Rules And Amendments To The Rules Governing The Courts of the State of New Jersey Adopted And Promulgated Subsequent To The Publication Of Volume I Of The Rules, p. 4 10

Stern & Gressman, Supreme Court Practice, 3rd Ed., §3-19 (pp. 85-86) 11

IN THE

Supreme Court of the United States

October Term, 1966

No.

MORRIS BRAUER,

Petitioner,

—v.—

SUPREME COURT OF NEW JERSEY,

Respondent.

In the Matter of MORRIS BRAUER, An Attorney at Law.

PETITIONER'S REPLY BRIEF

Without any fault of petitioner, this reply brief unfortunately will not be reaching the Court until literally the eve (or perhaps even the morning) of the Court's scheduled conference of June 2, 1967, where this case is listed for conference, as we are advised by the Clerk.*

---

* On p. 2 of the Brief In Opposition it is stated that the Clerk of the New Jersey Supreme Court—whom we served with the petition for certiorari by mail on April 20, 1967, since there did not appear to be any counsel or attorney whom we could serve—did not understand until on or about May 26, 1967 that the copies of the petition for certiorari received by him constituted service on the respondent. In a communication to the Clerk of this Court under date of May 24, 1967, we enclosed a copy of a letter which we sent to the Clerk of the Supreme Court of New Jersey under date of May 24, 1967 in which we had reminded the latter Clerk that the entire situation of the service of our petition for certiorari on the Supreme Court of New Jersey as respondent herein had been brought to the attention of the Clerk of that Court within about ten days from the time of said service. Our only reason for mentioning these facts is to repel any possible suggestion that the late filing of respondent's brief in opposition herein, and the consequent "last minute" filing of this reply brief, are attributable to fault of the petitioner; we received the brief in opposition in the mail yesterday, May 31, 1967.

I. Respondent's suggestion that the by-passing of the Hudson County Ethics Committee in this case is supported by relevant precedent.

Central to our petition for certiorari herein is our contention that it was improper to by-pass the regularly established County Ethics Committee procedure, and that the record contains nothing by way of justification of such by-passing. In the Brief In Opposition, pp. 4-5, it is stated:

> "* * * Moreover, the Petitioner was not treated in a manner different from other attorneys who have been subjected to the disciplinary procedures of the New Jersey Supreme Court. Disciplinary matters have been referred to a Judge acting as a master, rather than to an Ethics Committee, on other appropriate occasions. See *e.g. In re Mattera,* 34 N.J. 259 (1961); *In re Wittreich,* 5 N.J. 79 (1950) [The record shows that Mr. Justice Brennan, then a Judge of the New Jersey Superior Court, sat as a Master for the Court in the *Wittreich* matter]."

By the item just quoted respondent is evidently suggesting that the whole central emphasis of our petition for certiorari fails, in that the New Jersey County Ethics Committee procedure is subject to some sort of altogether normal or routine by-passing through use instead of special judicial Masters "on * * * appropriate occasions". We must perforce concede that, if such is in fact the posture and the method normally or routinely observed in New Jersey disciplinary proceedings against attorneys, everything in our petition for certiorari which turns upon our contention to the contrary is, at least *pro tanto,* defeated.

But, the issue thus sought to be drawn by respondent—to the effect that there is nothing unusual about by-passing

the regularly established County Ethics Committee procedure in New Jersey disciplinary matters against attorneys —is simply not justified by the two cases cited in respondent's brief at pp. 4-5 as above quoted. The first of respondent's two cases, *In re Mattera,* 34 N.J. 259 [also reported in 168 A. 2d 38] (1961), is not in point at all, because that was a case of charges of judicial misconduct (fixing traffic tickets) against the Magistrate of the Municipal Court of the City of Wildwood, New Jersey; the County Ethics Committee procedure, in which lawyers sit in judgment of other lawyers, would understandably have to be by-passed in a case of charges of judicial misconduct.

As to the second of respondent's citations, *In re Wittreich,* 5 N.J. 79 [also reported in 74 A. 2d 258] (1950), the ground of distinction which we assert is even more notable, we must respectfully state, than the judicial-misconduct distinction which we have above suggested in regard to the *Mattera* case. Indeed, it is surprising that, in a Brief In Opposition filed in this Court by the Attorney General of a State acting as attorney for the highest Court of a State, the ground of distinction now to be mentioned was overlooked: The ground of distinction in respect to the *Wittreich* case, *supra,* is, simply, that at the times which were operative in the *Wittreich* case, *there did not exist the present New Jersey County Ethics Committee procedure, and hence it was, altogether understandably, normal and proper at that time that a Judicial Master procedure should have been used in the Wittreich case rather than a County Ethics Committee procedure.*

Coincident with the adoption of a new Constitution in New Jersey effective in 1948, a new system of rules of practice and procedure for the governance of the New

Jersey State Courts became effective September 15, 1948. The *Wittreich* decision, *supra,* involved a disciplinary matter in which the respondent attorney, Andrew O. Wittreich, was ordered on *July 28, 1949* to answer charges of professional misconduct (74 A. 2d at p. 259)*; Mr. Wittreich's hearing on these charges was held on *August 2, 3 and 4, 1949* (*ibid*), a second hearing was held on *December 20 and 21, 1949* (*id.,* p. 261), and a third hearing was held on *April 17 and 21, 1950* (*ibid*).** In other words, the hearings in the *Wittreich* matter became lodged, before the Judicial Master therein† not later than *July 28 or August 2, 1949.*

In the Brief In Opposition herein respondent offers the *Wittreich* case, then, as one of the only two instances cited by respondent—the other such instance having been the *Mattera* case which involved disciplinary charges of judi-

---

* Incidentally, the Wittreich charges arose in Hudson County, New Jersey, the same "vicinage" as that involving petitioner Brauer herein. While it may transgress the bounds of "judicial notice" for this Court to take "notice" of the realities of New Jersey State politics, it may not be amiss to mention that "Hudson County matters" have tended, since the time of the political downfall of former Mayor Frank Hague of Jersey City, New Jersey, to be the subject of *"sui generis"* treatment in the thinking of both politicians and jurists in the State of New Jersey. But the question of whether such distinctive political and juridical attitudes concerning "Hudson County matters" in New Jersey are reconcilable with Federal Fourteenth Amendment standards of due process and equal protection may properly be raised before this Court, we believe, in a proper record setting, as we think is the case here.

** According to the Brief In Opposition herein, p. 5, these hearings in the *Wittreich* case were held before Mr. Justice Brennan of this Court, then a Judge of the New Jersey Superior Court, sitting as a Judicial Master in the Wittreich matter. Our specification, in the text, *supra,* of the dates of the hearings before the Judicial Master in the *Wittreich* case, is important for reasons which will shortly appear.

† See the preceding footnote.

cial misconduct against a municipal Magistrate—in which, supposedly, the New Jersey County Ethics Committee procedure was supplanted or by-passed by a Judicial Master procedure. In our petition for certiorari herein we ventured to state that we knew of no such applicable precedent for by-passing the County Ethics Committee procedure. Spurred by respondent's citation of the *Mattera* and *Wittreich* cases in the Brief In Opposition, we have further researched the situation for the purposes of this reply brief; and, as seen, the *Mattera* case is not in point at all, but, perhaps even more striking, the *Wittreich* case is not in point either, for the following reasons:

As above mentioned, a new system of Court rules in New Jersey became effective September 15, 1948 coincident with the then new State Constitution. The only provisions in those 1948 Court rules relating to discipline of attorneys were the following (Supreme Court Rules):

> "1:8-18. Discipline and Disbarment
>
> (a) Affidavits presented to the court for the purpose of obtaining a rule to show cause why the name of an attorney should not be stricken from the roll shall not be filed without an order of the court; and no such rule to show cause, if allowed, shall be actually entered until the court by special order so directs; and whenever such a rule, not entered, shall be discharged, no entry thereof shall be made and no papers shall be filed.
>
> (b) No person who shall be disbarred or suspended as an attorney-at-law shall, during the period of such disability, be permitted to practice as a counsellor-at-law.
>
> (c) No application for reinstatement by a person who has been disbarred or suspended as an attorney-

at-law shall be heard by the court unless ten days' notice thereof shall be given to the Chairman of the Grievance or Ethics Committee of the Bar Association which prosecuted the said disciplinary proceedings, and to the Chairman of the Grievance or Ethics Committee of the Bar Association of the County in which said person resides at the time of such application.

* * * * *

RULE 1:9. BAR ASSOCIATIONS AND LAWYERS' CLUBS

1:9-1. Procedure for Recognition

Any state or county bar association or lawyers' club shall be deemed to be a recognized bar association or lawyers' club within the intent of these rules through the entry of an order so designating it by this court.

1:9-2. Authorization of Ethics Committee

Any ethics committee of any state or county bar association or lawyers' club, which has been recognized as such by this court as provided in Rule 1:9-1, shall be deemed duly authorized within the intent of these rules if appointed or elected in accordance with the provisions of the constitution and by-laws of the recognized association or club.

1:9-3. Administration of Oaths by Ethics Committee

Any member of such committee is hereby authorized to administer oaths to all such witnesses as may appear or be brought before the committee.

1:9-4. Subpoenas for Witnesses Before Ethics Committee

(a) Upon the application or petition to him, by the chairman of the duly authorized ethics committee of

a county or state bar association or lawyers' club which has been recognized as such by this court, setting forth that in an investigation before it into the alleged unethical or improper conduct of an attorney or counsellor of this state, certain persons are material witnesses in said investigation and are residents of this state, any judge of the Superior Court may make an order awarding process of subpoena out of the court commanding such person or persons to appear before such ethics committee to give testimony and answer questions as required, and produce papers, documents, books and records concerning the matters and persons under investigation.

(b) Upon filing the order in the clerk's office of the Superior Court, the clerk shall issue process of subpoena under the seal of the Superior Court requiring such person or persons to appear and testify before the committee at a time and place named therein, and so from day to day until the examination of such person or persons shall be completed.

(c) The subpoena may also contain a direction that such person bring with him to the examination, any books, papers or documents therein mentioned, and the clerk shall issue under the seal of the Superior Court any further order in reference to the examination, appearance and production of books, papers or documents before the committee as the judge may direct.

1:9-5. Service of Subpoena; Fees of Witnesses

The process of subpoena authorized by Rule 1:9-4 shall be served in the same manner and be of the same force and effect as like process in civil actions in the Superior Court.

1:9-6. Disobedience to Subpoena; Penalty

(a) In case any person so summoned by subpoena issued as aforesaid shall refuse to obey the sub-

poena or any direction therein, or to give testimony, or to answer questions as required, or to produce any books, papers, documents or records as required, or in case any such person shall refuse to obey any order made by the judge as aforesaid, it shall be lawful for such committee, upon affidavits proving the facts, to apply to the judge of the Superior Court for a rule to show cause or an order of arrest against such person as for a contempt.

(b) The judge shall hear the application, and, if satisfactory proof be made of such refusal, shall issue an order, directed to the sheriff or any constable of the county, for the arrest of such person, and, upon his being brought before the judge, he shall proceed to a hearing of the cause.

(c) The judge shall have power to enforce, by imprisonment in the county jail, obedience to the subpoena, and the answering of any question that may be proper, and the production of any book, paper or document that the witness would be compelled to produce in a court of law, and also to compel the witness to pay the costs of said proceeding to be taxed by the judge.

(d) Any person who shall willfully and corruptly testify falsely to any material matter upon oath or affirmation administered by any member of such committee, upon the investigation or inquiry, shall be guilty of perjury."

Thus, the procedure established by the Court Rules newly effective in New Jersey as of September 15, 1948 contained no provisions for Court-appointment of any Ethics Committee and no comprehensive system for disciplining of attorneys by County Ethics Committees. The above-quoted new Court Rules effective September 15, 1948 referred only

to various, not necessarily officially recognized, pre-existing Ethics Committees or other Bar Association groups and to general variously pre-existing disciplinary powers of such County Committees or Bar groups, the only significantly or specifically spelled-out power of such groups under the new 1948 Rules being a power of subpoena; which is to say that, under the Court Rules made newly effective as of September 15, 1948 there did not exist in any sense a Court-appointed system of County Ethics Committees possessing anything resembling the comprehensive or indeed plenary powers for the disciplining of attorneys as set forth in the New Jersey Court Rules which were (or should have been) applicable to the case of the within petitioner Morris Brauer (see Appendix E to our within Petition for Certiorari, pp. A-55 to A-65, where we quote the presently operative New Jersey Supreme Court Rules 1:16 and 1:18).

If, then, the New Jersey Court Rules effective as of September 1948 did not establish a County Ethics Committee procedure in any manner remotely resembling the presently operative procedure, the following question becomes of immediate importance: At the operative times in the *Wittreich* case, *supra,* had the New Jersey Court Rules of September 15, 1948, been changed in any herein significant manner, so as to render respondent's citation of the *Wittreich* "precedent" appropriate? The answer appears to be unqualifiedly in the negative. Our research discloses that the only change in the applicable New Jersey Court Rules *of September 15, 1948,* which would affect the operative time-incidents in the *Wittreich* case were certain utterly non-significant changes in the Rules adopted *October 8, 1948* (details *infra*)—where as the reference to a Judicial Master (rather than to a County Ethics Committee) in the *Witt-*

reich case was made sometime between *June 23, 1949* (when the alleged misconduct of Mr. Wittreich commenced) and *July 28, 1949* (when Mr. Wittreich was ordered to answer charges of professional misconduct) (74 A. 2d at p. 259); and at those latter times the Rules had not been significantly changed. The above mentioned changes in the New Jersey Court Rules which were made *October 8, 1948* effected only a striking out, from the above quoted Rules 1:9-1 *et seq.* (effective September 15, 1948) of references to "lawyers' clubs" (see *Soney & Sage, Publishers, New Rules And Amendments To The Rules Governing The Courts of the State of New Jersey Adopted And Promulgated Subsequent To The Publication Of Volume I Of The Rules, p. 4* [no publication date stated, but evidently published in 1949, and containing amendments to the Rules to and including January 1, 1949]).

The next amendments affecting any aspect of the New Jersey Court Rules here in question, i.e., rules as to disciplining of attorneys or as to County Ethics Committees, etc., were adopted *November 10, 1949, which was several months after the operative dates in the Wittreich* case—where, as seen, the reference to a Judicial Master must have occurred not later than *July 28, 1949,* which was more than three months prior to the last mentioned amendments of the Rules adopted *November 10, 1949.* The amendments of *November 10, 1949 established, for the first time, the presently existing County Ethics Committee procedure,* i.e., the amendments of November 10, 1949 established for the first time a systematic procedure for Court-appointed County Ethics Committees with comprehensive disciplinary powers. Those amendments of November 10, 1949 are printed in 3 N.J. 635-642.

Thus, we respectfully repeat, there was not in existence, at the operative times in the *Wittreich* case, anything resembling the present New Jersey County Ethics Committee procedure, so that the reference in that case to a Judicial Master has no significance, for present purposes, as instancing a "precedent" (as claimed by respondent) for the by-passing of the County Ethics Committee procedure of which we herein complain.

II. The question of jurisdiction.

Respondent's principal thrust in the Brief In Opposition is that our Federal certiorari isssues are not timely because our petition for rehearing in the Supreme Court of New Jersey was not effective to lodge the Federal issues in this record. We note that the Supreme Court of New Jersey did not take, or in any way signify, any such position, in passing on our petition for rehearing (in which we fully spelled out the very same jurisdictional problem now urged by the Attorney General of New Jersey in his Brief In Oposition); and we seriously and respectfully question whether the Brief In Opposition by the Attorney General of New Jersey may rightfully or properly be taken as denoting any sort of authoritative "position" or "ruling" or "statement of State law by the highest Court of the State" on this question of the Federal certiorari jurisdiction of this Court. We take it, rather, that the question of certiorari jurisdiction will be independently considered by this Court. See *Stern & Gressman, Supreme Court Practice,* 3rd Ed., §3-19 (pp. 85-86).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
Attorney for Petitioner Morris Brauer